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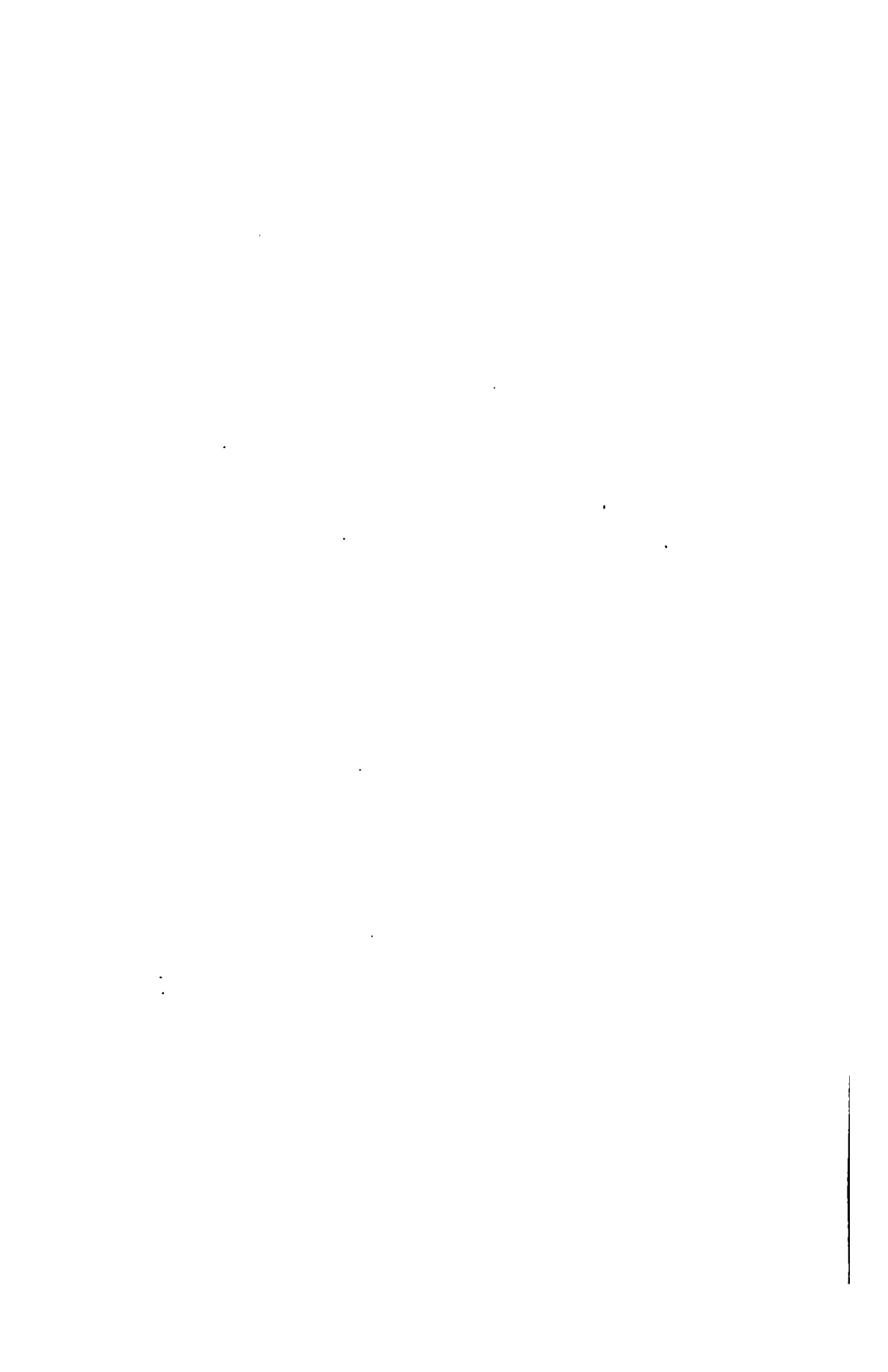
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NEW YORK

LEADING CASES

ANNOTATED

(Cited L. C. A.)

SELECTED RULING CASES FROM THE CURRENT DECISIONS
OF THE COURTS OF THE STATE OF NEW YORK
WITH COMPLETE ANNOTATION.

BEING
A NEW SERIES OF NEW YORK ANNOTATED CASES.

VOL. II

HIRAM M. ROGERS, EDITOR.

WILLIAMSON LAW BOOK CO.
ROCHESTER, N. Y.
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NEW YORK LEADING CASES ANNOTATED VOLUME II.

(Court of Appeals, November, 1912.)

HAUSER, Respondent, v. NORTH BRITISH & MERCANTILE INS. CO., Appellant.

(206 N. Y. 455, 100 N. E. 52. *Aff'g* 152 App. Div. 91, 136 N. Y. Supp. 1015.)

1. Insurance — Broker — Statutory limitation of right — Constitutionality.

§ 142 of the Insurance Law, which provides that no person, partnership, association or corporation shall act as insurance broker or

Note. — Right of one to engage in any lawful business.

- a. *Scope of note*, 1.
 - b. *Introductory*, 2.
 - c. *Statutes held unconstitutional*, 5.
-

a. *Scope of note.*

It is intended to include in this note those cases wherein are construed statutes which prohibit any one from engaging in any lawful business and
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receive commissions or compensation for doing insurance business, without first procuring a certificate of authority so to act from the superintendent of insurance, and before any such certificate shall be issued there must be filed in the superintendent's office a written application therefor setting forth that the applicant is engaged or intends to engage, in good faith, principally in the insurance business or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business, is unconstitutional as it arbitrarily interferes with a citizen's business pursuits, and, by unreasonable discrimination deprives him of that equal opportunity which the Constitution guarantees.

2. Statutes — When unconstitutionality of part affects whole.

Where the condition imposed upon the issuance of an insurance broker's certificate by the statute requiring such certificates as a prerequisite to doing business is unconstitutional, the whole statute is invalid.

Appeal from judgment of Supreme Court, Appellate Division, First Department.

Right of one to engage in any lawful business.—Continued.

not those cases which have construed statutes which merely regulate certain businesses. The cases dealing with statutes which regulate are numerous, but those which deal with statutes which actually prohibit are few.

Neither is it intended to include cases dealing with statutes which prohibit all persons from engaging in certain businesses such as § 4, ch. 202 of the Laws of 1884 which prohibits the manufacture, as an article of food, of any substitute for butter or cheese produced from pure unadulterated milk or cream. Nor is it intended to include cases dealing with public offices such as ch. 466 of the Laws of 1901 which forbids any pensioner of the city of New York, or any of its departments, to hold any office, employment or position under the city.

b. Introductory.

There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, are infringe-

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Hauser v. North British & M. Ins. Co.

Action by William Hauser against the North British & Mercantile Insurance Company, to recover commissions as insurance broker.

W. H. Benschoten, of New York City, for defendant-appellant.

William Hauser, of New York City, plaintiff-respondent, in person.

A. J. Tally, of New York City, for Supt. of Insurance.

A. R. Latson, of New York City, for Insurance Brokers' Ass'n.

GRAY, J. From the facts, which were agreed upon by the parties, in the submission of their controversy, it appears that the plaintiff was a lawyer and, in connection with the practice of the law, had, for some years, carried on the business of an insurance broker. He held what is termed a "first-class brok-

Right of one to engage in any lawful business.—Continued.

ments upon his fundamental rights of liberty, which are under constitutional protection. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial must, therefore, be free in this country to all alike upon the same terms. The liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States.

An individual has the right to carry on any lawful business in a lawful way.

People ex rel. Duryea v. Wilber, 198 N. Y. 1, 90 N. E. 1140.

A citizen's right of liberty includes the right to pursue any legitimate enterprise for livelihood, and this right can only be limited by the proper exercise of the police power.

People v. Horwitz, 140 N. Y. Supp. 437.

Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or pro-

er's certificate," which had been issued to him by the New York Fire Insurance Exchange, an organization formed by certain fire insurance underwriters. This certificate entitled him to receive commissions, or brokerage, as a fire insurance broker, to be paid by the members of the exchange, of which the defendant was one, upon his placing insurance with them. Upon the application of the plaintiff, the defendant issued, in the months of February and March, 1912, two policies of fire insurance, covering, the one, certain personal property, and, the other, certain real property, and delivered them to him for the owners. The amounts of the premiums, or charges, due upon these policies, were tendered by the plaintiff to, and were accepted by, the defendant and were duly indorsed upon the policies. At the time of making the payments of the premiums, the plaintiff demanded of the defendant "the usual broker's commissions * * * upon the premium paid, * * * agreed upon, and fixed by the members of the New York Fire Insurance

Right of one to engage in any lawful business.—Continued.

fession, are infringements upon his fundamental rights of liberty, which are under constitutional protection.

Matter of Application of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

Mr. Justice Peckham, writing for the Court of Appeals in *People v. Gillson* (109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465) said: "The following propositions are firmly established and recognized; a person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term "liberty" as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation."

In *People v. Beattie* (96 App. Div. 383, 89 N. Y. Supp. 193) we find the following quotation from the Supreme Court of the United States,

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Exchange." Payment, however, was refused by the defendant, "for the reason that the plaintiff had not, prior to the application for, and the issuance of, the said policies and the payment of the premiums of insurance, or charges, thereon, obtained a broker's certificate of authority, as provided in section 142 of the Insurance Law, and by reason of the provision contained in said section 142 for a forfeit to the people of the state of the sum of \$500 for a violation of any of the provisions of the section."

Section 142 of the Insurance Law, first inserted in 1911 by chapter 748 of the Laws of the year, as amended by chapter 1 of the Laws of 1912, went into effect, by its terms, prior to the time of the transactions between the plaintiff and the defendant. The section, so far as now material, provided that "no person, partnership, association or corporation shall act as broker in the solicitation or procurement of applications for

Right of one to engage in any lawful business.—Continued.

"Inalienable rights include the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life—the ordinary trades and pursuits, which are innocent in themselves, and have been followed in all communities from time immemorial—must therefore be free in this country to all alike upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

c. Statutes held unconstitutional.

As each of the following cases deals with a separate statute it is not deemed advisable to set the statute forth in full, separate from the individual discussion of each case.

A statute which forbids any one from selling a passage ticket giving a right to a passage or conveyance upon any railroad train unless he is an authorized agent of the company running such train, is unconstitutional. (*People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116,

insurance or receive for services in obtaining or placing such insurance any commission or other compensation from any underwriter authorized or permitted to do an insurance business in this state, or agent thereof, without first procuring a certificate of authority so to act from the superintendent of insurance, which must be renewed annually on the first day of January, or within six months thereafter." Provision was made for the payment of a fee of \$10 annually to the superintendent of insurance and for authority to him to revoke a certificate in case of violation of the statute. The section then reads: "Before any broker's certificate of authority shall be issued by the superintendent of insurance there must be filed in his office a written application for such certificate which must set forth:
* * * (d) That the applicant is engaged or intends to engage, in good faith, principally in the insurance business or that he conducts or intends to conduct such business in connec-

Right of one to engage in any lawful business.—Continued.

51 N. E. 1006; *People ex rel Fleischmann v. Caldwell*, 64 App. Div. 46, 71 N. Y. Supp. 654. Aff'd 168 N. Y. 671, 61 N. E. 1132.) The *Tyroler* case considered Ch. 506 of the Laws of 1897, which was the same as §§ 615 and 616 of the Penal Code, and which was substantially the same as Ch. 639 of the Laws of 1901, the statute considered by the *Fleischmann* case. The Act of 1901 so far as it is important for this note provides in substance that no person shall sell a passage ticket giving any right to a passage or conveyance upon any railway train unless he is an authorized agent of the company running such train, and unless he has received a certificate of authority therefor, in writing, from such company. In the Act of 1897 it was further provided that the properly authorized agent of any railroad company may purchase from the properly authorized agent of any other railroad company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction for which his ticket reads. The court in the *Tyroler* case held the act to be violative of art. 1, § 1 of the State Constitution which provides that no member of the state shall be disfranchised or deprived of his rights or privileges unless by the law of the land and the judgment of his peers; and also of art. 1 § 6, of the State Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law. After referring to those provisions of the constitution, and calling

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tion with a real estate agency or real estate brokerage business," etc. Subdivision "a," "b," and "c" need not be quoted. They require a description of the applicant, whether an individual, a partnership, or a corporation, a statement whether any certificate as agent, or broker, had been theretofore issued, and a statement of the business in which the applicant had been engaged. The section requires the application to be verified, defines the insurance contracts to which it is applicable, and provides that for a violation of its provisions there should be a forfeiture to the people of the state of \$500. After the act had gone into effect, the plaintiff made his application to the superintendent of insurance for a "broker's certificate of authority," which was refused upon the ground that "said application does not set forth that you are engaged, or intend to engage, in good faith, principally in the insurance business, or that you conduct, or intend to conduct, such business in connection with a

Right of one to engage in any lawful business.—Continued.

attention to numerous authorities in which the meaning of those provisions had been defined, the learned presiding judge, who wrote the opinion of the court, said: "Argument certainly is not needed, in the light of these decisions, to support the assertion that the 'liberty' of this relator and other citizens of this state to engage in the business of brokerage in passage tickets is sought to be interfered with by the statute under consideration, for brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies. The statute is, therefore in contravention of the State Constitution, and is void, unless its enactment by the legislature constituted a valid exercise of police power." In reaching such conclusion the learned judge called attention to the fact that at the present time great agencies are engaged in the ticket brokerage business, from whom tickets can be purchased over a great portion of the transportation routes of the world; that the traveling public in large numbers have come to make the use of the facilities afforded by such agencies, of which there are now very many; and that, if the statute under consideration is valid, all such companies must go out of business in this state unless some transportation company shall deem it wise to clothe them with authority to act as their agents. The evil which it is suggested would follow the enforcement of such a law consisted in the

real estate agency, or real estate brokerage business." He had stated in his application, in answer to questions embodying these requirements of the statute, that he was engaged "in the practice of the law and as an insurance broker in connection therewith," and he refused to pledge himself otherwise as to the conduct of his future business.

The case of the plaintiff seems quite clear. Within the existing agreement and in accordance with the rules of the Fire Insurance Exchange, he had entitled himself, by the performance of services as a fire insurance broker, to receive from the defendant the usual brokerage commissions, agreed to be paid in such cases. Their payment was refused solely because he held no certificate of authority from the superintendent of insurance, as required by section 142 of the Insurance Law. That official was prohibited by the statute from issuing such a certificate, unless the application contained the statement above

Right of one to engage in any lawful business.—Continued.

fact that under it the business of furnishing passage tickets to the traveling public would be confined to those persons who might be employed and designated as ticket agents by the transportation companies. The court in the *Fleischmann* case held that the same evils would follow under the Act of 1901 as under the Act of 1897 and reached the conclusion that the decision in the *Tyroler* case was decisive of the case before them.

Schnaier v. Navarre Hotel & Importation Co. (182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790) had to do with the constitutionality of Ch. 803 of the Laws of 1896, which applied to the City of New York only. The statute provides that every employing of master plumber shall be registered once a year, but in order to be registered he must hold a certificate of competency from the examining board of plumbers of the city; that it shall not be lawful for any person or copartnership to engage in, or carry on the trade, business or calling of employing or master plumber unless the name and address of such persons and of each and every member of such copartnership shall have been registered as above provided. In this case there were two members of the firm. One partner exclusively attended to the plumbing part of the firm business, and the other exclusively attended to the bookkeeping and financial part of it. Judge O'Brien, after stating that both the Federal and the State Constitutions provide that no person shall be deprived of life liberty or prop-

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quoted from clause "d" of the section, and he based his refusal of the application solely upon that ground. If the enactment of section 142 was a valid piece of legislation, the plaintiff was remediless without a certificate. If, however, the legislative act overstepped the limits, within which the Legislature may regulate and restrict the business pursuits of the citizen, then it was violative of the plaintiff's constitutional rights and was inoperative to deprive him of the right to his brokerage.

The Appellate Division, in the First Department, has held the statute to be unconstitutional legislation, and I think that we should affirm its determination.

It is evident, from a reading of the provisions of this added section of the Insurance Law, that it was the purpose of the Legislature to confine the business of the insurance agent, or broker, mentioned to those who should make that their principal business, or who should be real estate agents, or brokers.

Right of one to engage in any lawful business.—Continued.

erty without due process of law, and that these restrictions upon legislative power have been given a very wide application, said: "It cannot be denied that the statute in question operates to prohibit two persons situated as the firm in this case was, to enter into partnership for conducting a legitimate business. It prohibits a business man, with financial means and business ability, and a registered master plumber, with the requisite mechanical skill, from uniting the financial and business ability of the one with the energy and mechanical skill of the other in a partnership for conducting a legitimate business. The right to form partnerships for the conduct of business has existed from time immemorial and any interference with that right must be regarded as an unwarranted interference with individual freedom condemned by the Constitution. The feature of the statute to which I have referred would deprive a firm engaged in the plumbing business, composed of half a dozen persons, from enforcing contracts and collecting their bills for work done unless they could show that each and every member of the firm was a registered plumber, and if, as in this case, it was impossible for one of them to become registered, the firm must dissolve. A law that produces such results in its operation cannot be valid." In another place he says: "The right to follow any lawful pursuit is one of the inalienable rights of a citizen of the United States, and a law which prevents or hinders a man from going into partnership with another for the purpose of carrying on the trade, business or

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That was made a condition of the right to pursue the business. We may readily concede that, as a measure regulative of a business pursuit, which, from the extent to which it is carried on, is, presumably, affected with a public interest, the requirement by the Legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents and fitness of character, and be a reasonable enough precaution in the public interest. But the Leg-

Right of one to engage in any lawful business.—Continued.

calling of employing or master plumbers, infringes his natural rights as secured by the Constitution."

Chapter 572 of the Laws of 1905, so far as material to this note is as follows: "From and after the passage of this act (May 19, 1905) a person not already engaged in the business of undertaking shall not engage in such business unless he shall have been duly licensed as an embalmer and shall have been employed as an assistant to a licensed undertaker continuously for a period of at least three years. Such person shall make an application to the said board of embalmers' examiners for a license to engage in the business of undertaking. . . . If a firm or corporation shall desire to engage in the business or practice of undertaking, each member of the firm or the manager of each place of business conducted by the corporation shall be a licensed undertaker. . . ." The court in *People v. Ringe* (197 N. Y. 143, 90 N. E. 451) holds that this statute unnecessarily interferes with that liberty of person and property guaranteed by the Constitution. The court refers to the Fourteenth Amendment of the Federal Constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. It also refers to the State Constitution which provides that no person shall be deprived of life, liberty or property without due process of law, Art. 1, § 6) nor of the rights or privileges secured by any citizen thereof unless by the law of the land or the judgment of his peers. (Art. 1, § 1.) In referring to that portion of the statute which requires an undertaker to be an embalmer, the court said: "The work of an embalmer and that of an undertaker can, in most instances in the interests of economy and that orderly procedure desirable in the performance of such work, be done by the same person, but the public health does not require that an embalmer be an undertaker, or that an undertaker be an embalmer. The business

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islature has prescribed in this statute a condition for the issuance of the license, which is a purely arbitrary restriction. There is no good reason, and no public interest can, conceivably, be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be engaged. As it was intimated below, following the suggestion in *People v. Ringe*, 197 N. Y. 143, 90 N. E. 451, 27

Right of one to engage in any lawful business.—Continued.

of undertaking has been carried on for generations, particularly in the rural districts, by persons not holding embalmers' licenses and who have no special knowledge of the work of embalmers. There is nothing that occurs to us, or that has been called to our attention, to indicate any danger to public health in permitting a person otherwise qualified to carry on the business of undertaker solely because he is not a licensed embalmer." Referring to the provision requiring an undertaker to be employed as an assistant for a period of three years, the court says: "The provisions of the statute requiring that the service must be continuous and arbitrarily prohibiting the issuing of a license to a person to engage in the business of undertaking unless such person has been an assistant to a licensed undertaker for the time therein specified unnecessarily interferes with the common-law right to engage in a lawful business. It makes a particular form of acquiring skill and knowledge essential and forfeits the right to count the time so engaged in that particular education at each time when there is a break in the continuity of the service." And as to the provision prohibiting a firm from engaging in the business or practice of undertaking unless each member of the firm is a licensed undertaker, the court says it is clearly unconstitutional within the reasoning of *Schnaier v. Navarre Hotel & Importation Co. supra*.

The statute (Insurance Law § 142) construed in the text case, restricts the right to engage in the business of insurance brokerage to those who make it their principal business or to those engaged in the real estate business, and thereby prohibits any one engaged in any other business from engaging in business as an insurance broker. As Mr. Justice Gray says, the statute arbitrarily "interferes with a citizen's business pursuits, and, by an unreasonable discrimination, deprives him of that equal opportunity which the Constitution guarantees," and as the constitutionality of an act is to be tested by its effect upon the citizen's right freely to pursue lawful occupations the courts holds the statute to be unconstitutional.

L.R.A.(N.S.) 528, 18 Ann. Cas. 474, the legislation, now in question, must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare. And see *People v. Gillson*, 109 N. Y. 389, at page 399, 17 N. E. 343, 4 Am. St. Rep. 465. Why should those who wish to engage in the business of soliciting and placing insurance not be permitted to conduct it as incidental to, or in connection with, any other innocent occupation, except that of real estate brokers? Where the Legislature may prohibit a business, or an occupation, it may prescribe conditions upon which it may be conducted; but, if the business, or occupation, be useful to the citizen, and it be lawful, the Constitution, both of the state and of the nation, guarantees to him the right to pursue it freely, and any arbitrary restriction upon its pursuit should be condemned as an invasion of the guaranty. In varying language, but with the same thought, in very many cases, this court has pointed out that the constitutionality of an act is to be tested by its effect upon the citizen's right freely to pursue lawful occupations; that a statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; that the equal protection of the laws means equality of opportunity to all in like circumstances; and that classification to be valid must not be arbitrary and discriminate against persons without a basis in reason. These principles have become familiar from frequent statement in the decisions and need no citation, nor discussion, of the cases here. They have become constituent elements in our popular form of government. The very nature of our free government forbids that a man should be compelled to refrain from acts which the laws permit.

The statute before us goes far beyond what is proper regulation and is prohibitory, in preventing a person from pursuing the occupation of an insurance broker, except as his principal business, or as an adjunct to a real estate business. To use the language in the case of *Wynehamer v. People*, 13 N. Y. at page 399, this statute "passes the utmost limit of regulation, and

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does not even wear a disguise." The restriction is not in the public interests; it is obviously in the interests of the class, either of insurance, or of real estate, brokers. The insurance underwriters are not forbidden to transact their business through brokers; they are required to limit it to the class of brokers authorized by the statute. The plaintiff is a lawyer, and presumably the nature of that occupation should well qualify him to make insurance contracts, and there are many mercantile occupations, which certainly cannot be deemed to affect the person's fitness to solicit, or to place, insurance. But this statute would prevent them from adding to their earnings by pursuing that occupation. To concede the validity of this statute would be to concede a power to the Legislature in the guise of a regulation to destroy a lawful business. This plaintiff had built up a brokerage business, in connection with his other occupation—as many, presumably, others have done holding, similarly, fire exchange brokers' certificates. But, under this statute, he is compelled to refrain from it, unless pursued under conditions which involve the sacrifice of that other occupation. Arbitrarily, the statute interferes with a citizen's business pursuits and, by an unreasonable discrimination, deprives him of that equal opportunity, which the Constitution guarantees to him. What is there in the calling of an insurance agent, or broker, which demands any especial training, or knowledge, not readily to be acquired by any business man? That he should be qualified by antecedents and in character for engaging in an occupation calling for some degree of trustworthiness may be true; as it is, also, true that the nature of this occupation, differing from other mercantile pursuits, calls for an acquaintance with certain rules by which it is governed. But trustworthiness is the common property of men, and success in placing insurance will depend upon the industry, honesty, and competency, which the broker displays.

The statute invests the superintendent with no discretion, and he has not pretended to exercise any. He gave his reason for refusing a certificate in an inability of the department to grant it, for the failure of the plaintiff to subscribe to the con-

dition prescribed by the statute. That was of the essence of the legislation, read the section how you will. The Legislature was dealing with "Agents' and Brokers' Certificates of Authority." It commences by defining the terms of "agent and broker." It then requires an agent of an insurance underwriter to procure a certificate of authority from the superintendent of insurance, annually, and forbids the employment of an agent unless possessing such a certificate. It continues by forbidding an underwriter to pay commissions, or compensation, to such agent, unless holding such a certificate of authority, and, in the clause heretofore quoted, forbids any person from acting as a broker without that certificate. Then follows the provision, which has also been quoted from, that, before any broker's certificate of authority shall be issued by the superintendent of insurance, a written application must be filed, in which the applicant sets forth that he is, or intends to be, engaged principally in the insurance business, or that he will conduct it in connection with a real estate business. Thus, the sole purpose was to deal with the occupation of an insurance agent, or broker, and to restrict it to a certain class of persons. If there was the purpose, as suggested, of preventing a person from obtaining a certificate with the object of indirectly securing a rebate on the insurance of his own property, in the guise of commissions, the suggestion is too far fetched to save the act, as the Appellate Division said. Such a purpose could be appropriately accomplished by the "more direct and simple method" of prohibiting a broker from receiving commissions on the insurance of his own property, or that of any partnership, association, or corporation, of which he was a member, or employé.

If the statute is valid, it was effectual to prevent the plaintiff from enforcing a recovery from the defendant of the commissions he had earned; inasmuch as the procuring of a certificate was made a condition precedent to his right to receive any commissions, or compensation, for his services. See *Johnston v. Dahlgren*, 166 N. Y. 354, 59 N. E. 987; *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21. If the statute is unconstitutional, then the plaintiff is remitted to his status under the underwrit-

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ers' agreement and certificate, which, concededly, entitled him to receive from its members certain fixed commissions.

The argument that the invalid provision may be rejected and the rest of the section preserved has been sufficiently answered by the Appellate Division. The opinion of that court holds, in substance, that the requirement as to the statement in the application in question, was a restriction "imposed upon the issuance of a certificate" and was "a necessary part of the scheme requiring a certificate at all. For how are we able to say whether the Legislature would have required a license without imposing that condition upon its issuance? * * * Subdivision 'd' is the only condition imposed; the other statements required in the application being merely descriptive of the applicant." They say, further, in answer to the suggestion that the superintendent might ignore the invalid provision, that "the argument loses sight of the fact that the Legislature authorized him to issue a certificate only upon an application containing the said statement."

I reach the conclusion that the case was correctly decided below, and that the statute, being invalid, was inoperative to defeat the plaintiff's claim. This was the sole question presented by the appeal and I advise that the judgment should be affirmed; but, under the terms of the stipulation, without costs to either party, as against the other.

CULLEN, C. J., and HAIGHT, VANN, WERNER, CHASE, and COLLIN, JJ., concur.

Judgment affirmed.

(Court of Appeals, May, 1913.)

**JACOBS, Respondent, v. H. J. KOEHLER SPORTING
GOODS CO., Appellant.**

(208 N. Y. 416, 102 N. E. 519. Aff'g 152 App. Div. 933, 137 N. Y. Supp. 1123.)

1. Infants — Contributory negligence — Sui juris.

A boy fourteen years of age is deemed to be *sui juris*.

2. Infants — Negligence — Non sui juris — Imputed negligence.

An infant of tender years is incapable of personal negligence and is deemed to be *non sui juris*; but the negligence of its parents or guardian may be imputed to it.

3. Infants — Negligence — Sui juris — Degree of care required of infant.

Children who are *sui juris* are responsible for their failure to exercise reasonable care for their own protection but are not required to exercise the degree of care required of an adult. They are only required to exercise the degree of care expected from one of their years.

Note — Degree of care required of an infant sui juris to avoid imputation of negligence.

- a. *In general*, 16.
- b. *Degree depending on age and condition*, 29.
- c. *Degree depending on age and intelligence*, 29.
- d. *Degree depending on knowledge and capacity*, 31.
- e. *Exercise of foresight and vigilance*, 33.
- f. *Situations requiring reflection and judgment*, 34.
- g. *Questions for jury*, 34.

a. *In general.*

Although it was apparently decided by the court in *Byrne v. New York Central & Hudson River R. R. Co.* (83 N. Y. 620), that an infant, to avoid the imputation of negligence, is bound only to exercise that degree

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Appeal from a judgment of the Appellate Division, Second Department.

Action by Henry Jacobs, as administrator of Charles Jacobs, deceased, against the H. J. Koehler Sporting Goods Company to recover damages for the negligent killing of the plaintiff's intestate.

Paul Bonyage, of New York City, for defendant-appellant.

Martin T. Manton, and *William H. Griffin*, of New York City, for plaintiff-respondent.

CULLEN, C. J. This action was brought by the father as administrator of a boy 14 years of age, who was killed by the defendant's automobile, to recover damages for the death. It would be without profit to relate the circumstances of the accident. It is sufficient to say that both the negligence of the defendant's servant and the absence of contributory negligence on the part of the deceased were questions of fact. The case was, therefore, properly for the jury to determine.

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of care which can reasonably be expected of one of its age, it seemed necessary by the text case to finally decide this question.

In the *Byrne* case the infant was a girl eleven years of age. She was approaching the railroad from the east and was struck and injured by the rear end of a train backing northerly, while attempting to cross the railroad track upon a street crossing in the city of Troy. To quote from the opinion of Judge Earl: "If she had looked southerly while passing the last six feet of the easterly rail she would undoubtedly have seen the train; and probably the utmost caution would have required this. But she was required to look both ways. She did not know from which direction danger was to be apprehended. She may have looked southerly twice, as she testified she did, but during the last six feet—only three or four steps—she may have been looking in the other direction, or northwesterly in the direction in which she was going. It may be that this evidence would show the want of that care which the law would exact of

But one question is presented by this appeal which we are required to notice. The learned trial judge charged: "The deceased was probably *sui juris*, as they call it; but that does not mean that he must exercise the degree of care that an adult person must exercise, but he was charged with the duty of exercising the measure of care and caution that is common and usual with boys of that age." To this the defendant excepted and requested the court to charge: "That the burden of proof is upon the plaintiff to show that the deceased used the same degree of diligence in avoiding danger that would be exacted of an adult under the same circumstances." This was refused and the defendant excepted.

The learned counsel for the defendant insists that the decision of this court in *Tucker v. N. Y. Central & H. R. R. R. Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670, justified and required the court to charge as requested, and that the refusal to so charge is error. In other words, he contends that the law of this state is that a child of the age of deceased,

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an adult. But does it show the want of that care which is demanded of an infant of plaintiff's age? She cannot be supposed to have had that knowledge of the speed of trains and the importance of looking again, just before taking the step upon the truck, which an adult would have. The law is not so unreasonable as to exact from an infant the same degree of care and prudence in the presence of danger as it exacts from adults. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age."

That there was considerable confusion in the decisions upon this question will be seen by the opinion of Judge Laughlin, in *Lafferty v. Third Ave. R. R. Co.* (85 App. Div. 592, 83 N. Y. Supp. 405. Aff'd 176 N. Y. 594, 68 N. E. 1118). In that case a girl six years of age was struck and injured by one of the defendant's cable cars. The contention of counsel for defendant upon the trial was that, if the plaintiff was *sui juris*, she was bound to exercise the care of an adult, and he excepted to the charge that she was only bound to exercise such care as would be proper to her age and condition, and that the jury were to determine whether she could,

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in the absence of evidence to the contrary, must be deemed to be *sui juris* and be held to the same degree of care and prudence that is required of an adult.

That the deceased was *sui juris* is clear, but that an infant whenever he becomes *sui juris* is required to exercise the same degree of caution as an adult is not the law of this state, nor was it so decided in the Tucker Case. We think the rules governing the contributory negligence of infants are very well settled by the decisions of this court, though these rules do not obtain in many other jurisdictions.

An infant may be of such tender years as to be incapable of personal negligence. At such age the infant is termed *non sui juris*; but, if not responsible for its own negligence, the negligence of its parents or guardians in suffering it to incur danger may be imputed to it. This is what is called the doctrine of imputed negligence. *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Kunz v. City of Troy*, 104 N. Y. 344, 10

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by the exercise of such care as would be reasonably expected from one of her years, have avoided the accident; and this was also the contention of counsel for the defendant on the appeal, and he cited as authority to sustain his position the cases of *McDonald v. Railway Co.* (80 App. Div. 234, 80 N. Y. Supp. 577), and *Charlton v. Forty-Second St., etc., Ry. Co.* (79 App. Div. 547, 80 N. Y. Supp. 174). In answering this contention, the court said: "In these cases the rule was so stated, but the infants were twelve or more years of age, and, as appears by the opinions, considerable importance was attached to that fact. This court has, however, in the case of *Murphy v. Perlstein* (73 App. Div. 256, 76 N. Y. Supp. 657), declared the law to be that an infant *sui juris* is chargeable with contributory negligence, but that in determining whether he is guilty of contributory negligence his acts are to be considered with reference to his age and the degree of care that may reasonably be expected to be exercise by one of his years; and, while there is considerable confusion, if not conflict, in the decisions upon this question, both in the Appellate Division and the Court of Appeals, I think that this is the sound rule, and that it is sustained by the weight of authority." Further considering

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N. E. 442, 58 Am. Rep. 508; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108; Weil v. Dry-Dock, E. B. & B. R. Co., 119 N. Y. 147, 23 N. E. 487.

Later, children emerge from this condition, and are responsible for their failure to exercise reasonable care for their own protection. But they are not required to exercise the degree of care required of an adult, but only to exercise the degree expected from one of its years. Sheridan v. Brooklyn City & Newton R. R. Co., 36 N. Y. 39, 42, 93 Am. Dec. 490; Thurber v. Harlem Bridge, M. & F. R. R. Co., 60 N. Y. 326; McGovern v. N. Y. Central & H. R. R. R. Co., 67 N. Y. 417; Byrne v. N. Y. Central & H. R. R. R. Co., 83 N. Y. 620; Dowling v. N. Y. Central & H. R. R. R. Co., 90 N. Y. 670; Stone v. Dry-Dock, E. B. & B. R. R. Co., 115 N. Y. 104, 21 N. E. 712; McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812; Swift v. Staten Island R. Tr. R. R. Co., 123 N. Y. 645, 25 N. E. 378; Zwack v. N. Y., Lake Erie & W. R. R. Co., 160 N. Y. 362, 54 N. E. 785; Costello v. Third Ave. R. R. Co.,

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the question of the degree of care to be exercised by an infant, the court said: "The question as to whether this infant of six years, if deemed *sui juris* by the jury, was to be held accountable for her conduct as if she were an adult, is before us. I think she was free from contributory negligence, assuming her to be *sui juris*, if she exercised that degree of care and caution which would have been exercised by an ordinarily prudent child of her own age and intelligence under like circumstances; or, in other words, as might be reasonably expected of her in view of her age and intelligence. We may take judicial notice that children in going along upon a street, even though they are of sufficient age and possess sufficient intelligence to render it prudent for the parent or guardian to permit them to go about alone, engage in sport and play, and are otherwise attracted and diverted from exercising that degree of care and caution for their own safety that is exercised by ordinarily prudent adults. While children who are *sui juris* are chargeable with contributory negligence, and must exercise care for their own safety, it will not do to hold them responsible for the same degree of care as is exercised by ordinary prudent adults, or to cast upon them the burden of showing that

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161 N. Y. 317, 55 N. E. 897; *Simkoff v. Lehigh Valley R. R. Co.*, 190 N. Y. 256, 83 N. E. 15. In the *Byrne Case*, 83 N. Y. 621, an infant 10 years of age was the plaintiff. Judge Earl there said: "An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age." And the language of this learned judge has been cited with approval in the later cases.

The question when an infant ceases to be non sui juris and becomes responsible for its negligence has been the subject of some difference of views in this court. In the *Thurber Case* it was held that the plaintiff, an infant of eight or nine years of age, was not non sui juris. In *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440, where the injured child was less than seven years old, the court treated the infant as if it was sui juris. There is a strong intimation that the trial court erred in that respect, but the error was harmless as the plaintiff recovered. It was with this doubtful question, of

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they are incapable of exercising such a degree of care. Of course, as with adults, the court may be justified in deciding that they have been negligent as matter of law; but neither court nor jury should judge them."

In *McDonald v. Metropolitan St. Ry. Co.* (80 App. Div. 234, 80 N. Y. Supp. 577), referred to by Judge Laughlin in *Lafferty v. Third Avenue Ry. Co.*, supra, the court laid great stress on the question of the burden of proof. To quote from Judge Hatch's opinion: "The rule which is to be applied to infants is one of the burden of proof, and is not an inflexible rule of law, which determined that a particular age calls for the unvarying application of the rule of law which fixes responsibility for acts that obtains in the case of an adult. In the case of infants under the age of 12 years, the burden of proof is upon the defendant to show the possession by such infant of sufficient mental capacity to understand, appreciate, and guard against the situation in which it is placed, and the plaintiff may rest in respect of such question upon the legal presumption which protects the infant from the imputation of negligence, unless it be

when an infant becomes *sui juris*, that the Tucker Case was dealing, and it was there held, as already stated, that an infant over 12 years of age was presumed to be *sui juris*. True, it was also held in that case that, being *sui juris*, the child was guilty of contributory negligence which barred its recovery, but that ruling did not import, nor does the opinion declare that the measure of care required of an infant is the same as that of an adult. Of course, when an infant becomes responsible for its own negligence, the question whether its conduct constitutes negligence or not, like the question of negligence in regard to an adult, may be a question of law or may be a question of fact. But, even when determined as a question of law, the condition of the party injured is to be considered. All that was decided in the Tucker Case was that the conduct of the plaintiff was so careless as to constitute negligence even in the case of an infant 12 years of age. The case of *Thompson v. Buffalo Ry. Co.*, 145 N. Y. 196, 199, 39 N. E. 709, 710, is of a similar character. There the administrator of an infant aged 14 was

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a case where the negligence of the infant is imputable to the parent. When an infant is twelve years of age or above, the burden is upon the plaintiff to show the mental capacity of the infant, and establish as a fact that such infant was not possessed of sufficient mental capacity to exercise the degree of care and caution which is chargeable upon an adult, and it then becomes a question for the jury to determine whether the degree of care exercised in the particular case was such as to exonerate the infant from the charge of contributory negligence, measured by its age and capacity."

In *Charlton v. Forty-Second St., M. & St. N. Ave. R. R. Co.* (79 App. Div. 546, 80 N. Y. Supp. 174), also referred to by Judge Laughlin in *Lafferty v. Third Ave. R. R. Co.*, *supra*, the court followed the opinion in *McDonald v. Metropolitan Street Ry. Co.*, *supra*.

In *Murphy v. Perlstein* (73 App. Div. 256, 76 N. Y. Supp. 657), likewise referred to by Judge Laughlin in *Lafferty v. Third Ave. Ry. Co.*, *supra*, the court held as stated by Judge Laughlin that an infant *sui juris* is chargeable with contributory negligence but that in determining whether

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nonsuited for the contributory negligence of the deceased, but the rule applicable to the case is very clearly stated by Judge Haight: "Although a minor, no claim is made that Alcy was not *sui juris*. Whilst she may not have possessed the judgment, caution, and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age." The action was defeated because the deceased did not exercise the care to be expected of one of her age, not that to be expected from an adult. There is but one authority in this court in support of the contrary rule, that of *Honegsberger v. Second Ave. R. R. Co.*, *40 N. Y. 570, the doctrine of which was expressly repudiated in *Thurber v. Harlem B., M. & F. R. R. Co.*, *supra*. The charge of the trial court was, therefore, correct.

There doubtless comes a time in the life of a child when, though still in law an infant, it reaches such maturity that no distinction on account of age can be drawn in its favor. It is not necessary to determine what that time is. It is sufficient

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he is guilty of contributory negligence his acts are to be considered with reference to his age and the degree of care that may reasonably be expected to be exercised by one of his years. In that case, the plaintiff, a girl 14 years of age, was injured by falling into an unguarded excavation immediately adjacent to the side walk in the public street.

The strange part of the *McDonald* and *Murphy* cases, *supra*, with apparently opposite decisions on the question of the degree of care required of an infant is that the opinion in each case is written by Judge Hatch, and in the later case, the *McDonald* case, Judge Hatch does not refer to the *Murphy* case. It would seem that the court made the rule in each case to fit that particular case.

Tucker v. New York Central & Hudson River R. R. Co. (124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670), referred to in the opinion in the text case, was an action brought to recover for the death of a boy twelve years of age, who was killed by one of the defendant's locomotives when attempting to cross its tracks. Judge Parker, writing for the court said: "We are thus led to the conclusion that there was no evidence

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to say that, if a question of law and not of fact, the age is greater than that of deceased. The statutes of the state recognize this lack of judgment and responsibility on the part of immature persons. Thus it is forbidden to employ a child under the age of 14 years in a factory under any circumstances, or a child between 14 and 16 without the employment certificate provided by the statute (Labor Law [Cons. Laws, ch. 31], § 70), while a criminal act which would be a felony if committed by an adult is only a misdemeanor when committed by a child under the age of 16 (Penal Law [Cons. Laws, c. 40], § 2186).

The judgment should be affirmed, with costs.

WILLARD BARTLETT, HISCOCK, CHASE, COLLIN,
and HOGAN, JJ., concur; WERNER, J., absent.

Judgment affirmed.

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authorizing the jury to find that the plaintiff observed that degree of care and caution which the law imposes on one while in the act of crossing railroad tracks on a public street. If he had been an adult, therefore, it would have been the duty of the court to have dismissed the complaint. Does a different rule apply because the intestate was a boy only a little over twelve years of age? An infant of tender years is not expected to exercise the same care and caution which is required of a person of more advanced age, so that it frequently becomes a question for the jury, under proper instructions by the court, whether a child exercised that measure of care and caution which should be required and expected from it." He further says: "Aside from evidence of the boy's age, no fact was adduced tending to show that he was not as well qualified to understand and appreciate the danger which overtook him as an adult. And the question is, therefore, fairly presented whether a jury can be permitted to find from such fact, standing alone, that he was *non sui juris*." And concludes: "In the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*." The counsel for the

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defendant in the text case contended that the decision in the Tucker Case justified and required the Trial Court to charge "that the burden of proof is upon the plaintiff to show that the deceased used the same degree of diligence in avoiding danger that would be exacted of an adult under the same circumstances." The Court of Appeals in the text case said that it was of the doubtful question of when an infant becomes *sui juris* that the Tucker case was dealing, and that it was there held that an infant over twelve years of age was presumed to be *sui juris*. Chief J. Cullen said that it was held in that case that being *sui juris* the child was guilty of contributory negligence which barred its recovery. But that ruling did not import nor does the opinion declare that the measure of care required of an infant is the same as that of an adult. All that was decided in the Tucker case was that the conduct of the plaintiff was so careless as to constitute negligence even in the case of an infant twelve years of age.

A boy of thirteen is chargeable with the care and prudence commensurate with one of his years. *Lee v. Sterling Mfg. Co.* (134 App. Div. 123, 118 N. Y. Supp. 852). The lad in that case lost one of his fingers in the cog-wheels of one of the defendant's machines.

In an early case Judge Grover, after reviewing the cases from other states, said: "A somewhat different rule, determining the care to be exercised, is to be applied to infants, than is applicable to adults, when the inquiry is whether their negligence has contributed to an injury received." *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455.

In *Zwack v. New York, Lake Erie & Western R. R. Co.* (160 N. Y. 362, 54 N. E. 785), the plaintiff, a boy about ten years of age was struck by one of the defendant's trains at a street crossing in the city of Buffalo. Judge O'Brien in his opinion said: "In order to determine in such cases what degree of care a boy of ten years is bound to exercise, we must know something with respect to his capacity and maturity, and he is chargeable only with such a degree of care as can reasonably be expected from one of his age."

The boy injured by the defendant in *Simkoff v. Lehigh Valley R. R. Co.* (190 N. Y. 256, 83 N. E. 15), was over seven years of age. The trial court charged the jury that "if the jury find that the plaintiff, whether *sui juris* or *non sui juris*, failed to exercise such care as was commensurate with his years and intelligence then the verdict must be for the defendant." The charge was upheld by the appellate court.

In *Thompson v. Buffalo Ry. Co.* (145 N. Y. 196, 39 N. E. 709), the plaintiff's intestate, a girl of fourteen, was killed by a street car which struck her as she was crossing the track after she had waited for a car

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to pass in the opposite direction on the other track. As to the care required of the plaintiff's intestate, the court said: "While she may not have possessed the judgment, caution, and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age."

In *Sheridan v. Brooklyn City & Newtown R. R. Co.* (36 N. Y. 39, 93 Am. Dec. 490), the plaintiff's intestate, a boy nine years of age received injuries from which he died when he was thrown off from a moving street car by the rush of another passenger to get off. The defendant's counsel asked the court to charge: "that the fact that the deceased was a child makes no difference in the application of the rule of law as to the question of negligence, if not of years of discretion he should have a protector." In referring to this request and charge, the court said: "The proposition in question also embraces the degree of care necessary to be used by the deceased in respect to himself. It embraced too much in any aspect, when it requested a charge as matter of law, that 'if not of years of discretion he should have had a protector.' This would be a rule quite too rigid. There was no pretense that this boy was so young as to require a protector. The court did charge that if the jury were of opinion that the lad was negligent in any way, and his negligence contributed to the injury, the plaintiff could not recover; but if there was no negligence on the part of the boy, and there was on the part of the company, then he could recover. The rule of law was laid down generally, and the deceased, although a lad only, was required to conform to the standard. No exception or discrimination was made in favor of youth. It was not the province of the court to say, whether what the boy actually did or omitted, constituted negligence, that was for the jury exclusively. The court could only submit the general question of negligence to the jury, with instructions as to the law applicable to it. No one, whether sick, lame, imbecile or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence."

In *Wendell v. New York Central & Hudson River R. R. Co.* (91 N. Y. 420), the plaintiff's intestate, a boy seven years of age, was killed at a street crossing in Schenectady. It was assumed on the trial that the boy was *sui juris*. The court in the opinion by Ruger, Ch. J., said: "The assumption that the boy was *sui juris* implies that he had sufficient mental and physical capacity to be chargeable with the exercise of some

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degree of care and prudence and responsible for the consequences of some degree of negligence, but doubtless, owing to his tender years, a lesser degree of care was required of him than of one of mature age. Nevertheless an infant, whatever his age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger."

In *Quinlan v. Richmond Light & R. R. Co.* (133 App. Div. 402, 117 N. Y. Supp. 641), plaintiff, a boy of nine, was struck by one of the defendant's cars while attempting to cross the street. On the question of contributory negligence, the court said: "While the same acts committed by an adult would have warranted the conclusion of the existence of contributory negligence, the law is not so unreasonable, as the learned trial justice properly instructed the jury, 'as to require of children the same degree of prudence that is required of adults.'"

Weaver v. Bullis (60 Hun, 579, 14 N. Y. Supp. 338), was an action to recover for injuries received by a boy nine years of age by coming in contact with the defendant's mowing machine. The trial court found that the boy was as careful as could be expected of a boy of his age, and the general term upheld the application of the rule as to the degree of care required of an infant.

A child of immature years, cannot, and should not, be called upon to use such care in avoiding a danger as an adult ought to use. Nor can a dull or crippled child be expected to be so alert to danger as a bright and active one of the same age. Freedom from contributory negligence is evidenced by the fact as to whether under all the conditions surrounding the accident reasonable care was exercised to avoid it. It logically follows that a child who has attained some degree of development and intelligence is not relieved from exercising and proving that he exercised such care as could be reasonably expected from one of his years and intelligence and experience. The true rule in all actions for personal injuries based on negligence, therefore, is that an infant, whether *sui juris* or *non sui juris*, must exercise such reasonable care in avoiding the injury of which he complains, as can fairly be expected of a child of his age, natural capacity, intelligence, physical condition, training, experience, habits of life, and surroundings. (*Ardolino v. Reinhardt*, 130 App. Div. 119, 114 N. Y. Supp. 508.) The plaintiff in that case, a boy four and a half years of age, was run over by a wagon while playing in the street.

In *Costello v. Syracuse, B. & N. Y. R. R. Co.* (65 Barb. 92), the court held that an instruction to the jury that there was no difference between children and adults as to the degree of care and caution to be exercised in crossing the railroad track, was erroneous. In that case the

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plaintiff's intestate, a girl seven years of age, was killed by one of the defendant's trains while crossing its tracks at a street crossing. The appeal of that case was dismissed in 55 N. Y. 641, without opinion.

There is but one authority in the Court of Appeals which is not in accord with the rule set forth in the text case. That is the case of *Honegsberger v. Second Ave. R. R. Co.* (40 N. Y. (1 Keyes) 570, 2 Abb. Dec. 378, 33 How. Pr. 193). Judge Hogeboom, writing the opinion of the court said: "The point then to be determined is, what would be the degree of care which would be required of the infant to exempt him from the imputation of negligence. I know of but one rule on the subject as the law is held with us, and I think it applies to all persons without exception, and makes no discrimination on account of age. It is that degree of care which a person of ordinary prudence would exercise in the situation supposed. There is no other safe rule. No other rule would protect the community. An infant of tender years, incapable of exercising requisite discretion, is not to be permitted to occupy the highway for the purpose of entitling himself to an action for an injury except upon the condition of being suspected to the consequences of negligence attached to persons in general. Otherwise the tenderer the age and the less the discretion, the more perfect and frequent the cause of action, because more easily sustained and oftener occurring. Such a rule is not capable of safe practical enforcement." Three judges dissented. The case was not reported in the regular series of reports of this state, and probably for the reason that the principle decided was thought to be at least doubtful and might not be followed as a precedent. The doctrine of the case was expressly repudiated in *Thurber v. Harlem, B. M. & F. R. R. Co.*, *supra*.

Burke v. Broadway & Seventh Ave. R. R. Co. (49 Barb. 529, 34 How. Pr. 239), was an action to recover damages for the loss of the services of a boy six years of age who was run over by one of the defendant's cars. On the question of care, the court held that the boy was required to take the same care of himself as any other person. This case is in line with the *Honegsberger* case, *supra*.

In *Casey v. New York Central & Hudson River R. R. Co.* (6 Abb. N. C. 104), the plaintiff's intestate, a girl of fourteen was killed by one of the defendant's cars. In this case Judge Daly followed his former opinion expressed on the trial of *Honegsberger* case, *supra*, which was reversed by the Court of Appeals, to the effect that a minor is required to exercise only that degree of care and judgment which one of his age ought to have exercised under the circumstances.

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

b. Degree depending on age and condition.

Judge Andrews says: "In applying the rule that a person, who seeks to recover for a personal injury sustained by another's negligence, must show himself free from fault, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. *Reynolds v. New York Central & Hudson River R. R. Co.*, 58 N. Y. 248.

The court in *Thies v. Thomas* (77 N. Y. Supp. 276), charged the jury that "an infant *sui juris* was bound to exercise that degree of care which can be reasonably expected of one of his age and condition under the same circumstances." The infant in that case, a boy of six, was killed by the defendant's automobile.

c. Degree depending on age and intelligence.

A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence. *Serano v. New York Central & Hudson River R. R. Co.* (188 N. Y. 156, 80 N. E. 1025). The plaintiff in that case, a girl less than six years of age was injured at a street crossing by one of the defendant's trains.

In *Moebus v. Hermann* (108 N. Y. 349, 15 N. E. 415), the plaintiff, a lad of about seven years, was run over by a wagon. On the question of care, the court said: "The child was less than seven years old and therefore had not reached an age at which infants are generally supposed to be of full discretion or capable of crime of which laches and neglect are but degrees. (Penal Code, §§ 18, 718, sub. 1.) But the case was given to the jury as one in which he was bound to exercise care in attempting to cross, and to look and see if he could do so safely, the court saying, "the rule of vigilance applies to children as well as to adults, 'but' that a child of immature years, whilst bound to exercise care, is held to no higher degree of forethought than you could expect of its age;" and again, "if you say the child did what an ordinarily careful child would have done, then it is not negligence;" and at the request of defendant's counsel he charged, that it was as much the duty of the boy to look out for vehicles while crossing the street, as it was for the driver to see that he did not come in contact with any one;" also that "if the boy failed to adopt the means known to him to be effective in protecting him against danger, and was injured thereby, the plaintiff can-

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

not recover." No exception was taken to the charge, nor is it open to any."

It is well settled that a plaintiff who is *sui juris*, though a child of tender years in order to be free from contributory negligence must exercise some care in approaching danger—not the same degree as an adult, but such care as is commensurate with its age and intelligence. (Smith v. Rochester Ry. Co., 133 App. Div. 847, 118 N. Y. Supp. 78; Simkoff v. Lehigh Valley R. R. Co., 190 N. Y. 256, 83 N. E. 15.) In the Smith case a boy of eight was struck by one of the defendant's cars while playing in the street. In the Simkoff case, a boy of seven was run down by a locomotive engine.

A child may only be held to the exercise of that degree of care which one of his years and intelligence can be expected and required to exercise. (Batchelor v. Degnon Realty & Terminal Imp. Co., 131 App. Div. 136, 115 N. Y. Supp. 93.) In that case the plaintiff, five years of age, was run over by one of the defendant's dirt cars.

It is the settled rule in this state that a child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances; but he is required to exercise such care and prudence as is commensurate with one of his age and intelligence. Kostenbaum v. New York City Ry. Co. (120 App. Div. 160, 150 N. Y. Supp. 65). In that case the plaintiff's intestate, a girl about six years of age, was run over by one of the defendant's street cars.

Judge Houghton in Atchason v. United Traction Co. (90 App. Div. 571, 86 N. Y. Supp. 176), says that an infant whether he be *sui juris* or *non sui juris*, is not in law excused from exercising such care as is commensurate with his years and intelligence in approaching and passing known objects and places of danger. In that case the plaintiff's intestate, a girl five and a half years of age, was killed by one of the defendant's cars. Judge Houghton, further says: "Where an infant is so young that it has no judgment and is not expected to avoid danger, manifestly the only negligence which can be imputed to it is that of the person having it in charge. But there comes a time in the development of a child when it must have learned some things. Although it may lack judgment to act with care and circumspection in regard to avoiding danger, yet it may be quite sensible of the necessity of avoiding contact with many objects which experience has taught will inflict harm. Certain children might very early learn to avoid passing vehicles, and that there was great danger in a moving car. When an infant complains of wrongs to himself, the defendant has a right to insist that he should

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

not have been a heedless instrument of his own injury. The negligence of an infant *non juris* may very seldom become a matter of law for the court to decide. But where a child is old enough to have any experience and intelligence it becomes the question for the jury to determine whether he exercised the degree of care and caution which should be expected from one of his age, experience, and intelligence. If he had knowledge and experience, and failed to exercise any care commensurate with his age and knowledge, it would be the duty of the jury to deny him any redress."

d. Degree depending on knowledge and capacity.

The injury to the plaintiff in *Thurber v. Harlem Bridge, M. & F. R. R. Co.* (60 N. Y. 326), was occasioned by his being thrown down by one of the horses attached to defendant's railway car and run over by the car while he was in the act of crossing the street. The plaintiff was a boy of seven years of age. The defendant's counsel requested an instruction to the jury that the plaintiff, although a boy, was held answerable for the same degree of prudence and foresight, in avoiding an injury, as an ordinary prudent person would be. The judge had charged the opposite of this, and in substance that a person of feeble understanding is not held to the same degree of diligence or vigilance, as a person of better understanding, and that a lad of the age of this young boy, is not held to the same degree of vigilance that would be required of a mature and adult person, and that it was to be determined by the jury in the exercise of their common sense, whether the boy considering that he was but seven years of age, omitted any reasonable precaution and was guilty of negligence. Whether he should have seen the car and might, with the understanding he possessed and under the circumstances of the case, have avoided the accident, and if so, such omission would be fatal to his recovery. In its opinion the court said: "The plaintiff is only sought to be held responsible for his own negligence, and the question is whether he is only to be held to that ordinary or reasonable care and caution which might reasonably be expected from boys of his own age under the same circumstances, or whether he is to be held to the full measure of prudence which the law exacts from adults in the possession of all their faculties." And further: "By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends on his age and knowledge. The caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of that case."

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

Johnson, Commissioner, in *Mowrey v. Central City Ry.* (51 N. Y. 666), said that the rule, requiring the absence of contributory negligence, was not established out of any tenderness for the negligent infliction of an injury, but to discourage carelessness; and that, in determining whether the fault exists, the condition of the person whose acts are in question should be considered; and that the old, the lame, the infirm or the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them; that no greater degree of care was required than the capacity of the person would allow him to exert. The plaintiff in that case, a boy fifteen years of age, was injured while attempting to get on to one of the defendant's cars.

Marius v. Motor Delivery Co. (146 App. Div. 608, 131 N. Y. Supp. 357), was an action brought to recover for the death of a boy eight and a half years of age who was struck in the highway by one of the defendant's motor trucks. The Appellate Division reversed the judgment of the Trial Court because of errors and omissions in the charge. Judge Laughlin for the court said: "The court failed to inform the jury that it was the duty of the decedent to conduct himself as a reasonable and prudent boy of his age and understanding would have conducted himself under like circumstances, or that the standard by which they were to determine whether or not the decedent was guilty of contributory negligence was whether he exercised that care which would ordinarily be exercised by a child of his age and understanding and of ordinary prudence." The court said further that it was not for the jury to determine what care he should have used. The law prescribes that he should have used the same care that a person of the same age, education and mental and physical capacity ordinarily uses under like circumstances. In referring to a request to instruct the jury, which the court said should have been granted, Judge Laughlin said: "The court was thus duly requested to instruct the jury that it was the duty of the decedent to exercise reasonable care to avoid injury, and that reasonable care is the care that could fairly be expected of a child of his age, capacity, intelligence, and physical condition, and that, if he had greater natural capacity and intelligence than the average boy of his age, he was bound to use a degree of care proportionately greater, and that, if he failed so to do, the defendant was entitled to a verdict."

In *Force v. Standard Silk Co.* (160 Fed. 992 (N. Y.)), a boy of 14 was injured in attempting to tie up a belt, which was wound around a shaft. The court held that the charge of the trial judge was correct wherein the jury were told that "In determining this question of contributory negligence, you are not controlled by the same rules you would be

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

in the case of an adult who understands and appreciates the dangers of the situation, or the dangers of doing what he does do. The plaintiff was an infant—not of mature years—not experienced with such machinery, the evidence tends to show, and, he says, not informed of the dangerous character of this machinery, and he claims the dangers of intermeddling with it were not obvious to him even if they were to an experienced man for the reason stated, and that he didn't appreciate them. An infant, in order to avoid the implication of negligence, is bound to exercise only that degree of care which can reasonably be expected from one of his years; one of his years, in the first instance, and then comes in experience and knowledge gained in the work; hence, you gentlemen of the jury, must consider his age, his capacity, his intelligence, his experience, if any, in the business in which he was engaged; also what information he had received and gained, and what instructions he had received on the subject, if any."

e. Exercise of foresight and vigilance.

In *O'Mara v. Hudson River R. R. Co.* (38 N. Y. 445), the plaintiff's intestate, a lad of eleven and a half years, was killed at a street crossing by an engine called the "Jones." The court, in speaking of the degree of care required of the infant, said: "In the present case, it is to be considered, also, that the deceased was a lad, eleven and a half years old, to whom greater indulgence should be extended than to an adult. He was of that age, that he was quite fit to be trusted with the care of his own person in the streets of a country village, and yet it is not probable that he would exercise as much prudence and caution as would an adult. If an aged or infirm person had been found upon the crossing of this street, when the "Jones" was started westerly in such a position that he could have been seen by the engineer or fireman, it would have been the engineer's duty to have stayed the engine, so that the disabled person could make his escape. It would have been his duty, if practicable, to have ascertained that he was thus disabled, and to have allowed more time for his passage than would have been allowed to one less unfortunate. The old, the lame and the infirm are entitled to the use of the streets, and more care must be exercised toward them by engineers than toward those who have better powers of motion. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance as those of maturer years. More care toward them is required than toward others. In the case of a child but two or three years of age, no knowledge, or foresight could be expected. This an engineer is bound to know, and if the child is within his view, to act accordingly. In a case like the present, that of a boy eleven and a half years of age, the jury were not bound to require the same demureness and caution as in the case of an older person."

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

f. Situations requiring reflection and judgment.

In *McCarragher v. Rogers* (120 N. Y. 526, 24 N. E. 812), the plaintiff was a boy fifteen years of age. He was working on a printing and stamping press in the defendant's factory, and was injured by having his foot caught in the cylinder thereof. There was evidence as to the defective character of the apparatus. The court in considering the question of the degree of care which should be used by the infant said, that so far as the danger was known and obvious to him, the boy may have been legally as responsible for his own protection as a full grown person. However, it was not necessarily an obvious condition of danger but was matter of some reflection and judgment to appreciate the consequences which might result from the defective character of the apparatus, and therefore, it could not be held as a matter of law that the plaintiff was guilty of contributory negligence.

The plaintiff's intestate, in *Barry v. New York Central & Hudson River R. R. Co.* (92 N. Y. 289), was a boy ten years of age. He was killed at a railroad crossing. The court in speaking of the question of contributory negligence said: "The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care and circumspection in a child of tender years as in an adult, and in the case of a child, where the circumstances would justify the inference that he was misled or confused in respect to the actual situation, and that his conduct was not unreasonable under the circumstances and in view of his age, then the question of contributory negligence is for the jury, and this although he may have omitted some precaution which in the case of an adult would be deemed strong, or even conclusive evidence of negligence."

g. Questions for jury.

In *Stone v. Dry Dock E. B. & B. R. Co.* (115 N. Y. 104, 21 N. E. 712), the plaintiff, a girl of seven, was injured while crossing the street in front of an approaching car. The court said that "assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years." This measure of care is all that the law exacts in such a case.

In *Simkoff v. Lehigh Val. R. R. Co.* (190 N. Y. 256, 83 N. E. 15), an infant of seven was run down by a locomotive engine. The court there said that the degree of care to be reasonably expected of an infant of the plaintiff's age was a question of fact for the jury to determine under the circumstances and upon the evidence as to his capacity and intelligence.

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

The plaintiff in *Haycroft v. Lake Shore & Mich. So. Ry. Co.* (2 Hun, 489, aff'd 64 N. Y. 636), was in her seventeenth year. She was struck and injured by one of the defendant's trains at a street crossing. In speaking of the degree of care to be exercised by the plaintiff, the court said: "If there is any allowance to be made, in measuring the degree of care which this young girl was bound to use, for her youth, her inexperience, for the tendency of persons of her age to allow their attention to be given to objects of interest in their immediate view, and to overlook dangers from causes not immediately in view, then it was for the jury to say, whether this young girl did not, under all the circumstances, use all the care and diligence to guard against danger, that could be reasonably required from one of her age. If no allowance is to be made for her youth and inexperience, the question was one of law, and properly disposed of by the learned judge. But I cannot think the law is so unjust as to hold this child to the exercise of the same degree of care and caution that would be required of an older person, and if not, the question should have been submitted to the jury."

In *McGovern v. New York Central & Hudson River R. R. Co.* (67 N. Y. 417), the plaintiff, a boy of eight years, was injured at a railroad crossing. After waiting for a freight train to pass he attempted to cross the track when he was struck by an engine backing in the opposite direction. The court said that "the rule which requires persons before crossing a railroad track to look to see whether trains are approaching, and that if they omit to do so, and are injured by a collision, which if they had looked would have been avoided, are to be deemed guilty of negligence, is not to be applied inflexibly, and in all cases, without regard to age or other circumstances. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care of circumspection in a child of tender years as in an adult. The circumstances at the time and the appearances, were calculated to confuse and mislead him. He very naturally may have inferred that the flagman was flagging the passing train and not the backing engine, and when the first danger was passed he doubtless proceeded on his way unconscious of any other peril. The learned judge at the trial, in a very careful charge to the jury submitted to them to determine on this point whether "he did all that could be required of a lad of his years for his own safety," and this, we think, was right, and that he could not have decided the question of negligence as one of law, conceding the fact to be, that the deceased did not look west before stepping on the track."

In *Costello v. Third Avenue Railroad Co.* (161 N. Y. 317, 55 N. E. 897), the plaintiff, a boy of eight years was injured while attempting to cross Third Avenue in the city of New York in front of one of the moving cars

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

of the defendant. Bartlett, Judge, in his opinion said: "In the city of New York, where the traffic is enormous upon its principal avenues, it is oftentimes necessary for the wayfarer to pass in front of moving cars, and it usually depends upon the surrounding circumstances of each case whether the particular act of crossing was negligent or not. If the pedestrian is obliged to cross the street a short distance in front of a car moving at a very moderate rate of speed, and with a vigilant motorman in charge, no danger need be apprehended, but if the latter may turn his back on the track before him and send his car ahead with unexpected and dangerous velocity, it is clearly a question for the jury whether the mature judgment of an adult might not fail to save him in such an emergency. In the case at bar it was for the jury to say whether the plaintiff might not have crossed the track in safety, in the exercise of such care as was reasonably to be expected of one of his age, had it not been for the gross carelessness of the motorman."

In *Swift v. Staten Island Rapid Transit Railroad Co.* (123 N. Y. 645, 25 N. E. 378), the plaintiff, a girl fifteen years of age, was injured while crossing the defendant's railroad track. The girl after waiting for a train from the east to pass, started to cross the next track when she was struck by a train from the west. To quote from the opinion: "If it be assumed in this case that the girl stepped upon the track and attempted to cross without looking to ascertain whether a train was approaching from the west, or if she did look and saw it, and nevertheless attempted to cross, then, no doubt, she was guilty of contributory negligence. But the difficulty is that the testimony on this point is conflicting. She swears as before observed, that before stepping upon the track she looked to the west, and no train was in sight from that direction, and then looking to the east, she saw the train about to start from the station, and that waiting for a moment for the train from that direction to pass, she again started to cross, and was struck by a train from the other direction, which, according to the evidence of other witnesses, was running at a high rate of speed. She was unfamiliar with the locality, and presumptively in regard to the time of the arrival and departure of trains. Her attention was attracted by the passing train from the east, and her opportunities to see and hear the train from the west were obstructed by the smoke and noise of the bell and engine starting out, and under all the circumstances cannot, as we think, be held as matter of law that she neglected to exercise that degree of care and caution required of a person of her age, situated as she was. The degree of care and caution required by the law in such case depends upon the maturity and capacity of the individual, and all the surrounding circumstances; and if there is any doubt as to the facts, or as to the inferences to be drawn from them, the question cannot be determined as matter of law, but must be submitted to the jury."

Degree of care required of an infant sui juris to avoid imputation of negligence.—Continued.

It is well settled that the same degree of care is not required of an infant of tender years which is required of an adult. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age, and in passing upon the question of contributory negligence the age of the infant, with all the other circumstances in the case, is to be considered by the jury. (Dowling v. New York Central & Hudson River R. R. Co., 90 N. Y. 670.) The plaintiff in that case, a girl nine years of age, was injured by a train at a street crossing.

In *Brown v. City of Syracuse* (77 Hun, 411, 28 N. Y. Supp. 792), which was an action by an infant eight years of age to recover for injuries received from falling on the slippery and uneven sidewalk. The court said that "an infant to avoid the imputation of negligence is bound only to exercise that degree of care which can reasonably be expected of one of its age; and in passing upon the question of contributory negligence, the age of the infant with all the other circumstances in the case is to be considered by the jury. What in the case of adults might as matter of law be contributory negligence may in the case of infants of the age of the plaintiff present a question of fact for the jury."

(*Court of Appeals, June, 1913.*)

**GLENNAN, Appellant, v. ROCHESTER TRUST &
SAFE DEPOSIT CO., Respondent.**

(209 N. Y. 12, 102 N. E. 537, *Aff'g* 152 App. Div. 316, 136 N. Y. Supp. 747.)

1. Bills and notes — Check as assignment — Revocation.

A check of itself is a mere order for the payment of money not operating as an assignment of any part of the funds the authority of the drawee or the banker to pay which may be revoked or countermanded by the drawer.

2. Bills and notes — Authority of agent to collect check — Revocation by death of principal.

The death of the principal revokes the authority of the agent to collect the check.

Note. — Death of drawer as revocation of bank's power to pay check.

Aside from the text case, a diligent search discloses but one other case in this state in which the question of the revocation of a bank's power to pay a check by the death of the drawer is considered. That case is *Fordred v. Seamen's Savings Bank* (10 Abb. Pr. (N. S.) 425). There it was held that a draft drawn by a depositor upon a bank is a mere direction of power which is revoked by the death of the drawer.

When the text case was in the Appellate Division, presiding Justice McGlennon, writing for the court, said: "We think the Trial Court was right, however, in charging the jury that if the bank had had knowledge of Callahan's (the depositor) death before the check was presented for payment or if it had learned facts sufficient to put a reasonable man upon his inquiry, it was not protected in paying the check."

But the important question decided by the text case is as to the liability of a bank which pays a check after the drawer's death, without notice thereof. The court, in rendering the first decision on this question in the United States, holds that the bank is not liable, where it has acted in good faith, for the further payment of the amount of said check to the administrator of the depositor.

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3. Principal and agent — Revocation of agency — Death of principal.

The common law doctrine that death revokes an agent's power even as to third persons dealing with the agent in good faith without notice, is the general rule in this state, and this rule is an exception to the still broader rule that revocation of the power of an agent does not affect third parties dealing with him in good faith without notice.

4. Banks and banking — Death of drawer of check — Effect of payment without notice.

Although the power of a bank to pay a check is revoked by the death of the drawer, a bank is not liable for the amount of the check paid after the death of the drawer without notice of such death.

5. Courts — Consistency of legal principals.

A rule of conduct of a whole people long prevailing and acted upon should not be subordinated to mere consistency of legal principals.

Appeal from a judgment of the Appellate Division, Fourth Department.

Action by John W. Glennan, as administrator, against the Rochester Trust & Safe Deposit Company, to recover amount of deposit made by plaintiff's intestate.

H. W. Rippey, of Rochester, for plaintiff-appellant.

A. P. Whipple, of Rochester, for defendant-respondent.

CULLEN, C. J. The action is brought by the plaintiff as administrator of a depositor in the defendant trust company to recover the amount of a deposit made by the intestate. The defense was payment and an assignment of the deposit by the intestate to a third party. The payment proved was that of a check drawn by the intestate, but not presented to or paid by the defendant until after the death of the former, of which the defendant claimed to be ignorant. While the case was submitted to the jury on both issues, the jury was directed to answer specific questions of fact, one of which was: "Did the bank pay the money without knowledge of the death of John Callahan

(plaintiff's intestate) and in the due course of business?" This question the jury answered in the affirmative. If the finding required a verdict in the defendant's favor, as the trial court charged, it is not necessary to consider the other rulings on the trial of which the appellant complained, as they do not affect this issue.

It is singular that there should be such a paucity of judicial decisions on this question, as seems to be the case. In my search through the reports I have been able to find only one on the precise point., *Rogerson, Executor, v. Ladbroke*, decided by the English Common Pleas in 1822 (1 Bing. 93), in which it was held that the payment or rather the charge of a check to a depositor's account made by the banker after the death of the depositor, but before the bank had received knowledge of that fact, was a valid payment, and that the banker was not liable for the amount. There is another case often cited to the same effect (*Tate v. Hilbert*, 2 Vesey, Jun. 112) where the Lord Chancellor expressed the opinion that if the holder of a check had collected the money from the banker after the death of the drawer, but before the banker had knowledge of death, no court would take the money away from her. This was purely obiter, simply the chancellor's opinion, for, as a matter of fact, the suit in which the opinion was expressed was dismissed and the complainant remitted to her action at law. On the other hand, none of the cases cited by the learned counsel for the appellant is authority for the contrary proposition. The greatest reliance is upon *Davis, Adm'r, v. Windsor Savings Bank*, 46 Vt. 728. There a woman from time to time deposited certain sums of money in a savings bank to the credit of her brother, in whose name the passbook was issued. The jury found that these moneys were the property of the brother and had been collected by the woman on his account. After the death of the brother, but before notice of that death had reached it, the defendant paid the amount of the account to the woman who presented the passbook. It was held that death revoked the agency of the plaintiff, and that the payment was bad. No question of the payment of a check was involved in this case, for there was

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none. As to the other cases cited: *Fordred v. Seamen's Savings Bank*, 10 Abb. Prac. (N. S.) 425, was an action by the holder of a check against the bank, which refused to pay it. Of course, in this state no such action could be maintained whether the drawer was dead or alive. In *Podmore v. South Brooklyn Savings Institution*, 48 App. Div. 218, 62 N. Y. Supp. 961, payment was made by the bank after knowledge of the death of the depositor to one who presented the passbook, claiming the deposit as a gift *causa mortis* from the deceased. As the jury found there was no gift, the defense failed. Here, again, no question of a check was involved. This is the same case which is reported in this court on a subsequent appeal under the title of *Mahon v. South Brooklyn Savings Institution*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603. In *Pullen v. Placer County Bank*, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, the check was paid, not only after the death of the drawer, but after the defendant had been informed of the death, as is stated in the opinion of the court. But, while there is this paucity of judicial decisions on the subject, there seems to be absolute unanimity in the rule as declared by the leading text-writers. *Chitty on Bills*, *429, *Byles on Bills* (Sharswood Ed.) p. 22, 2 *Parsons on Notes and Bills*, p. 81, *Story on Promissory Notes*, § 498a, *Edwards on Bills and Notes*, § 739, *Morse on Banks and Banking*, § 400, and *Daniels on Negotiable Instruments*, § 1618b, all declare that, while a bank should not pay a check after the death of the drawer, still a payment made in good faith, without knowledge of the death, or of facts sufficient to cause inquiry, is a valid payment, though the only authority usually cited is that of *Tate v. Hilbert* (*supra*).

For the appellant it is argued, first, that a check of itself is a mere order for the payment of money, not operating as an assignment of any part of the fund, the authority of the drawee of the banker to pay which may be revoked or countermanded by the drawer. This is the rule of law prevailing in England and in this country, with the exception of a very few states in which a check is considered as an assignment of the fund. The

rule stated is unquestionably the law of this state as well as the law of the federal courts. *Atty. Gen. v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816; *Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897; *Florence Mining Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; *Fourth St. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855.

That the death of the principal revokes the authority of the agent to collect the check in those jurisdictions where the check is considered a mere order must also be conceded. *Fordred v. Seamen's Bank*, *supra*; *Atty. Genl. v. Continental Life Ins. Co.*, *supra*; *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. ed. 1167.

It is further true that the common-law doctrine that death revokes an agent's power, even as to third parties dealing with the agent in good faith without notice, is the general rule in this state. *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696.

At this point we reach the very crux of this case, and the question is whether payment of checks by banks or bankers is an exception to the rule stated. I think it is. It must be first borne in mind that the rule itself is an exception to the still broader rule that revocation of the power of an agent does not affect third parties dealing with him in good faith without notice. This is the rule of the civil law even where the agency is revoked by death. The common-law rule in some states has been changed by statute, in others repudiated (*Cassidy v. McKenzie*, 4 Watts & S. [Pa.], 282, 39 Am. Dec. 76; *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212), while in still others greatly limited (*Lenz v. Brown*, 41 Wis. 172; *Ish v. Crane*, 8 Ohio St. 521). There are differences between the liability of banks to their depositors and that of ordinary debtors to their creditors which justify excepting the payment of checks from the rule. If an ordinary debtor refuses to pay his debt to the agent of his creditor, his liability is in no respect increased. It is not so with a bank. Its contract with the depositor is to pay his checks as long as his deposit is sufficient

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for the purpose, and for a failure to pay the checks the bank is liable for any injury to the credit of the drawer occasioned thereby. In the ordinary conduct of a bank but a minute fraction of its payments is made directly to its depositors. The others are made on checks in favor of third parties, usually, at least in large cities, presented through other banks or the clearing house. The number of depositors is often very great, many of them living at other places than where the bank is located. Of the death of those prominent, either by their public position, their business activities or great wealth, the bank might be apprised; but of the great mass their deaths would pass unknown by the bank unless notice of the fact was given. It would be utterly impracticable for business to be done if, before the bank could safely pay checks, it must delay to find out whether the drawer is still living.

But the dominant and controlling reason for holding that the usual rule that a debtor is not protected in payment to an agent after the death of his principal, though without knowledge of that fact, is not applicable to the payment of checks by banks, is that such has almost universally been accepted as the law. As already said, all the text-books so state the law (in England it has been so settled by section 75 of the Bills of Exchange Act of 1882), and apparently the whole country has assumed the text-books to be right. The rule thus adopted, if not strictly a rule of property, is a rule of conduct affecting property interests that very closely approximates to a rule of property. I think the fact that the rule has been adopted by the community is reasonably clear. The use of banks as depositories of money and the practice of making payment by checks prevails in this country to an extent far beyond that existing in any other, so that the situation presented in this case must have frequently arisen. True, where the estate of the depositor is solvent and the check is given for value, it is of no practical moment whether the bank is liable for the payment of a check after the death of the drawer or not. Very many, however, must have been the cases where either the estate was insolvent or the check was given without value and the bank has paid it after death, in ignorance of that fact. Yet, in my

research, I have not been able to find in the reports in this country or in England a case where it was sought, under such circumstances, to hold the bank liable except the Rogerson Case, *supra*, in which the attempt failed.

The rule that denies protection to persons dealing with an agent after the death of the principal, though in good faith and without knowledge of that fact, is an inherited one. In the Wilson Case it was declared by this court to be a harsh one, but the court felt that it has been too firmly established in this state to be disturbed by judicial decision, though it recommended a change by the Legislature, to place the law in harmony with the more enlightened views of the present time and to promote the interests of justice. The same reason which there constrained the court to give effect to the rule, despite its disapproval of it, should also impel us to hold the rule inapplicable to bank checks. If there it appeared that the doctrine of the common law had prevailed too long to be disregarded, it also appears almost equally clearly that the common-law doctrine has never prevailed as to checks; for a legal proposition may be nearly as well established by its general acceptance and the failure of any one to question it as it can be by a series of judicial decisions. Even if it should be assumed that the distinction sought to be drawn between the relation of a bank to its depositors and that between ordinary debtors and their creditors would not justify a distinction in the principle of law applicable to the respective cases, nevertheless a rule of conduct of a whole people long prevailing and acted upon should not be subordinated to mere consistency of legal principles. The law presents anomalies. They are to be regretted; but no one would maintain that merely to avoid inconsistency courts would be justified in disregarding rules of action long established by judicial decisions, especially when the exception is more just than the general rule.

The judgment appealed from should be affirmed, with costs.

WERNER, HISCOCK, CHASE, COLLIN, and HOGAN, JJ., concur. WILLARD BARTLETT, J., absent.

Judgment affirmed.

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Young v. Ingalsbe.

(Court of Appeals, June, 1913.)

YOUNG, Appellant, v. INGALSBE, Respondent.

(208 N. Y. 503, 102 N. E. 590. Aff'g 151 App. Div. 375, 135 N. Y. Supp. 939.)

1. Statute of frauds — Sale of personal property — Part payment or delivery and acceptance of part — Mutual participation and assent.

Personal Property Law, § 31, provides: "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

* * * (6) Is a contract for the sale of any goods, chattels or

Note.—*Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.*

- a. *The Statute*, 46.
- b. *Sufficiency of delivery and receipt*, 46.
 - 1. *In general*, 46.
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 - 3. *Constructive or symbolical delivery*, 53.
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- c. *Sufficiency of acceptance*, 56.
 - 1. *In general*, 56.
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 - 3. *Acceptance of ponderous and bulky articles*, 63.
 - 4. *Acceptance before delivery*, 63.
 - 5. *Purchase by sample*, 65.
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 - 8. *Acts of ownership by vendee*, 67.
 - 9. *Acceptance of part of goods*, 68.
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things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money." Whether part payment or delivery and acceptance of part of the goods is relied upon to validate a verbal contract for the sale of goods, the participation and assent of both parties to the act is necessary.

2. Statute of frauds — Sale of personal property — Receipt and acceptance — Mutual participation or assent.

Where plaintiff and deceased entered into a verbal agreement whereby plaintiff was to purchase the interest of deceased in a law library which they owned together and apply the purchase price on decedent's indebtedness to the plaintiff, and thereupon the plaintiff accepted of the interest, took possession and assumed ownership of the books and gave deceased credit on his indebtedness for the purchase price, but deceased took no part in the receipt or acceptance of the books, a valid contract is not established under § 31 Personal Property Law. Nor

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

a. *The Statute.*

The part of the statute of frauds relevant to this note follows:
Personal Property Law, § 31. —

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: * * * (6) Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receipt part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money.

b. *Sufficiency of delivery and receipt.*

1. *In general.*

To take a verbal sale of goods out of the statute of frauds, the acts of the parties must have been of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer; and the change of possession necessary is an open and public one, which is to continue and be manifested by outward and visible signs, such

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was the contract made valid by the credit given deceased as it was not made at the time of the agreement and the deceased was not in any way an actor in regard to it.

Appeal from a judgment of the Appellate Division, Third Department.

Action by William E. Young against Grenville M. Ingalsbe, as executor of Lyman H. Northup to recover on claim against the estate.

Erschine C. Rogers, of Hudson Falls, for plaintiff-appellant.

Thomas A. Sherman, of Hudson Falls, for defendant-respondent.

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as to render it evident that the possession of the judgment was ended, for he must cease from his apparent as well as real ownership.

Rheinfeldt v. Dahlman, 19 Misc. 162, 43 N. Y. Supp. 281.

Marsh v. Rouse, 44 N. Y. 643.

Shindler v. Houston, 1 N. Y. 261.

Rodgers v. Phillips, 40 N. Y. 512.

Where there is anything to be done by the vendor in order to ascertain the value, quantity, or quality of the goods, the delivery is not complete so as to take the case out of the statute of frauds.

Outwater v. Dodge, 7 Cow. 85.

McDonald v. Hewitt, 15 Johns. 349.

Bailey v. Ogden, 3 Johns. 399.

In *Outwater v. Dodge*, supra, the court held that the mere unloading of fish at a certain dock was not a delivery within the meaning of the statute of frauds, where the fish were to be inspected.

Mere words are not sufficient to constitute delivery of personal property under the statute of frauds.

Schindler v. Houston, 1 N. Y. 261.

Caulkins v. Hellman, 47 N. Y. 449.

Moore v. Bixby, 4 Hun, 802.

COLLIN, J. The plaintiff claimed, as a creditor, a sum from the estate of Lyman H. Northup, deceased. The statute of limitations barred his recovery (except as to one item allowed by the judgment of the Appellate Division), unless a transaction between the plaintiff and the deceased constituted a sale by the latter to the former of his interest in certain books and the crediting by the former of the price upon the indebtedness, and prevented its application. The question for our determination is: Did the transaction effect that result?

The transaction as found by the referee was: The plaintiff and the deceased owned, with equal interests, a law library. The deceased was indebted to plaintiff and they, at a stated time, entered into an agreed, wholly unwritten, whereby the plaintiff purchased the interest of the deceased, the purchase price to be applied by the plaintiff upon the indebtedness. Immediately after the time when the agreement was made, the

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

The subject of the parol sale in *Clark v. Tucker* (4 N. Y. Super Ct. [2 Sandf.] 157), was a quantity of hats in the possession of a factor. A letter from vendee's agent to the factor, on the day of sale was relied upon to show constructive delivery. The court held that as the vendor did not join in it, it would not support the sale as the act of delivery must proceed from the vendor. A second letter written by the vendor to the factor two weeks after the bargain was made was also held to be too late to sustain a constructive delivery, as to constitute delivery it should be substantially at the same time and as a part of the same transaction.

Where the vendor expressly forbids the vendee or his agent to remove straw from the cars on which he has loaded it until it is paid for, the possession of the straw is not unequivocally surrendered, and such retention of control is inconsistent with such a complete delivery as is necessary to take the case out of the condemnation of the statute of frauds.

Scully v. Smith, 110 App. Div. 88, 96 N. Y. Supp. 998.

Where after a parol contract for the sale of sheep, the sheep are selected and separated from the rest of the vendor's flock, and the vendee's mark put upon them, and then, after such separation, it is agreed to let them

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plaintiff accepted of the interest and caused to be pasted upon the backs of the books leather labels with his name printed thereon, took possession, and assumed and still assumes ownership of the books, and gave the deceased credit for the sum of \$77 on account of and pro rata on the several items of the indebtedness.

The part of the statute of frauds relevant to the transaction is: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: * * * (6) Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidence, or some of them, of such things in action; nor at the time, pay

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run with the vendee's sheep for a few days, there is sufficient delivery to satisfy the statute of frauds.

Rappleve v. Adeo, 65 Barb. 589.

There is not sufficient delivery under an oral contract for the sale of goods where the vendor, upon the vendee's refusal to accept the goods sells them to a third person.

E. R. Brackett Co. v. Kornblum, 71 Misc. 123, 127 N. Y. Supp. 1078.

No delivery to buyer takes place sufficient to satisfy the statute of frauds, where, upon an order for goods, a shipment is made differing in kind, quantity, etc., from the order given.

Ralph v. Stuart, 4 E. D. Smith, 627.

A delivery in pursuance of an order, whether at the store of a factor, on board of a vessel, or to the purchaser himself, is a compliance with the order, and is an acceptance on the part of the purchaser, which, whether by him or by his agent is sufficient to hold him liable.

Outwater v. Dodge, 6 Wend. 397.

Dyrer v. Forest, 2 Abb. Pr. 282.

Retention of a dynamo for a merry-go-round for a number of weeks
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any part of the purchase money." Personal Property Law (Consol. Laws 1909, c. 41), § 31.

The statute made void the verbal agreement in the present case unless there was, subsequent to and in pursuance of it, either the acceptance and receipt by the plaintiff of Northup's interest or the payment by him, at the time the agreement was made, of the purchase price or a part thereof. The rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the thing sold delivered to the purchaser (*Olyphant v. Baker*, 5 Denio, 379; *Bissell v. Balcom*, 39 N. Y. 275), is devitalized by the statute in the cases within its provisions. In those cases the statute renders essential to the proof of a valid

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

by the keeper of a public resort, was held sufficient ground for finding delivery so as to take the case out of the statute of frauds.

Greene v. Seitz, 29 Misc. 312, 60 N. Y. Supp. 503.

In *Grey v. Cary*, 9 Daly 363, the defendants selected a scale under an oral contract to purchase same. The delivery was undertaken by the vendor's carman. When he arrived at the defendant's office, he entered, presented the bill, and said he had the scale on his truck. He was told to drive with it into the back yard, and in attempting to do so the scale was accidentally broken. The court held that there was no receipt of the scale by the defendants.

There is a sufficient delivery to satisfy the statute where, on a verbal sale of cattle, it was agreed that they should remain in the possession of the vendor, but at the risk of the vendee, until he called for them; and after one of them died the vendee's partner came and took away the others.

Vincent v. Germond, 11 Johns. 283.

In *Gray v. Payne* (16 Barb. 227), it appears that the plaintiffs and the defendant entered into a parol agreement, by which the former were to sell to the latter four hogs, which the defendant was to take into his possession and slaughter and dress at his own expense. When dressed the hogs were to be weighed and the defendant agreed to pay \$5 per cwt. for them

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contract of sale, not only evidence of the verbal contract, but also evidence of a receipt and acceptance by the vendee of a part of the goods or of a payment at the time the oral agreement was made. The contract must be authenticated by a prescribed act of the parties in pursuance and part performance of it. The act may originate with the vendor or vendee; with the vendor if a delivery of part of the goods and their acceptance by the vendee is the ground for validating the contract; with the vendee if part payment is relied upon. In either case the participation and assent of both parties to it is necessary. The receipt of the goods by the vendee implies a delivery by the vendor. Delivery and receipt of the goods without acceptance is insufficient, and payment implies a receipt and acceptance of the consideration by the party to whom it is made. Hawley

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

to be secured by an approved note on interest at forty days. The hogs were delivered, slaughtered, dressed and weighed according to agreement, and a good note tendered to the plaintiffs. The court held that there was sufficient delivery to satisfy the statute of frauds, and that therefore the sale could not be rescinded.

Where goods are purchased but not delivered, recitals in the bills made out by the vendor that the goods are held subject to the vendee's order, is not binding on the latter so as to satisfy the statute of frauds requiring a delivery of possession.

Talcott v. Einstein, 10 Daly, 210, 12 N. Y. Weekly Dig. 441.

In Timoney v. Hoppock (13 N. Y. Civ. Proc. 361), it appears that an elevator had been installed by the tenant of a building under a written agreement with the landlord that the same could be removed at the termination of the lease in case the landlord did not desire to purchase same at that time. Just before the expiration of the lease the landlord's agent said he wanted the elevator "and would do what was fair." The court held that the elevator was delivered and accepted when this agreement was made, and therefore the sale was not affected by the statute of frauds.

In Shindler v. Houston (1 N. Y. 261), the plaintiff, after asking for and receiving an offer from the defendant for certain lumber piled on a dock, said, "The lumber is yours, get the inspector's bill and take it to H., and

v. Keeler, 53 N. Y. 114; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6, 26. While the statute does not interdict the establishment of the verbal contract by parol testimony, it guards against the misunderstanding, misconception, or perjury of the parties by requiring proof of the mutual confirmatory act evidencing intelligence and finality concerning it on the part of each. A writing, of course, evidences the contract as to both parties. Where it is omitted, but the vendee has paid part of the price or the vendor has delivered and the buyer has accepted a part of the goods upon the strength of the agreement, those acts furnish unequivocal evidence of the existence of a contract of some sort between them, although its terms and the performance of the attesting act must after all depend upon the recollection of witnesses. The design of the statute requires that neither party

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he will pay you," but when the bill was presented, payment was refused. The court held that there was no delivery and receipt within the meaning of the statute.

In *Smith v. Mason* (Anthon's N. P. 164 [2nd Ed. 225]), the vendee's shop boy was persuaded by the vendor's agent to send a cartman for the goods sold. The court held that the unauthorized act of the shop boy was not sufficient to establish delivery as there was no acquiescence on the part of the vendee, who might have refused to receive it had he been present.

2. Where part of goods are delivered.

In contracts for the sale of goods, which are divisible and capable of a separate physical performance, the clear weight of authority is, that a delivery and acceptance of part, renders the contract valid.

Bradley v. Wheeler, 27 N. Y. Super. Ct. (4 Rob.) 18.

Dennison v. Carnahan, 1 E. D. Smith, 144.

Where, at the time of making a verbal agreement to purchase a quantity of bags, the vendee receives a portion thereof conditionally for examination, and afterwards tells the vendee's agent he will take the whole lot, including the part delivered, such delivery of a part of the goods operates to take the case out of the statute of frauds as to the whole lot.

Bristol v. Mente, 79 App. Div. 67, 80 N. Y. Supp. 82.

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can create the evidence which shall prove the unwritten contract as against the other. *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Rodgers v. Phillips*, 40 N. Y. 519; *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. ed. 337.

The facts found by the referee in this case do not establish the contract. Upon the part of the deceased there was merely the naked, verbal agreement. He did not by any act or participation in any act subsequent to it assent to or recognize or confirm it. Each act of the plaintiff was individual and independent. His possession of the books, if had at the time of the agreement, was not on the strength of or pursuant to it but under another and prior arrangement and, if acquired subsequent to the contract, was without a delivery and through his sole and exclusive act. Under either hypothesis the title of the deceased

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

3. Constructive or symbolical delivery.

"Actual delivery," in the popular sense of the words, is not in all cases, requisite, but a virtual delivery will, in some instances, be equally effectual. A delivery may be presumed or inferred from circumstances; but the circumstances which are to be tantamount to an actual delivery, should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties.

Bailey v. Ogdens, 3 Johns. 399.

The court in *Johnson v. Smith* (Anton's N. Y. 60 (2d Ed. 81)), following the decision of the court in *Bailey v. Ogden* (3 Johns. 421), held that the delivery of the export entry upon a verbal contract for the sale of sugar was not such a delivery as to satisfy the statute of frauds.

And in *Smith v. Mason* (Anthon's N. P. 164 (2d ed. 225)), it was held that a delivery of a bill of parcels is not sufficient to take a sale out of the statute of frauds, where the vendor gives his vendee a bill of parcels and an order on the keeper of the store where the goods are located, such order is a delivery so as to prevent the operation of the statute of frauds.

Hollingsworth v. Napier, 3 Caines, 182.

In *Parker v. Jervis* (3 Keyes, 271), an assignment of a stock of goods was made to a creditor of the assignor. At the time of executing the

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to the books did not pass to the plaintiff by virtue of a receipt and acceptance because he did no act by which he relinquished his dominion or recognized and confirmed that of the plaintiff over them. *Brand v. Focht*, 1 Abb. Dec. 185; *Marsh v. Rouse*, 44 N. Y. 643; *Stone v. Browning*, 68 N. Y. 598; *Rourke v. Bullens*, 74 Mass. (8 Gray) 549.

Manifestly the contract was not made valid by the credit given the deceased by the plaintiff and for two reasons: It was not made at the time of the agreement; the deceased was not in any way an actor in regard to it. *Hunter v. Metsell*, 57 N. Y. 375, 15 Am. Rep. 508; *Brabin v. Hyde*, 32 N. Y. 519; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536.

The judgment should be affirmed, with costs.

CULLEN, CH. J., WERNER, WILLARD BARTLETT,
CHASE, and HOGAN, JJ., concur, HISCOCK, J., absent.

Judgment affirmed.

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assignment the keys of the store were delivered for the purpose of giving the creditor dominion over the property. The clerks were discharged by the assignor and thereupon hired by the creditor and left in charge. The creditor at the same time took the books, the notes and accounts from the store to his office. The signs were also taken down, and the other creditors were informed of the transaction. The court said that this evidence showed a fair case of a delivery of the goods, and a continued change of possession under the assignment; and as the jury found a delivery the court could not interfere therewith.

In *Cooke v. Millard* (65 N. Y. 352), the defendants gave the plaintiffs a verbal order for lumber of certain dimensions, and pointed out in the yard the piles from which they wanted the lumber taken. They also directed that when dressed and cut it should be placed upon plaintiff's dock, and notice should be given of readiness to deliver. Plaintiffs prepared the lumber, placed it on the dock and gave the notice as agreed. The

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next day the lumber was destroyed by fire. The court held that there was not the receipt and, acceptance necessary to satisfy the statute.

The subject of the sale in *Dixon v. Buck* (42 Barb. 70), were cumbersome articles, and were not at the time in the actual custody of the vendor, but were upon the premises and in the immediate possession and custody of third persons. They were turned out to the vendee where they lay, and he made arrangements with the persons who had them in charge to keep and take care of them for him. The court held that this was clearly sufficient, under the circumstances, to constitute a valid dwelling and change of possession.

The wheat, which was the subject of the sale in *Dows v. Montgomery* (28 N. Y. Super. Ct. [5 Rob.] 445), was on board of two vessels when the negotiations for the sale of it commenced. By agreement between the parties, and at the vendee's request it was stored in a warehouse. The wheat was sold by sample, and the vendee requested the warehouseman to compare same with sample for him, when it was delivered. The court held that such delivery at the request of the vendee was sufficient to satisfy the statute of frauds.

The delivery of samples of goods is not sufficient to take a verbal sale out of the statutes of frauds (*Johnson v. Smith*, Anthon's N. P. 60 [2d ed. 81]; *Carver v. Lane*, 4 E. D. Smith, 168). The court in the *Johnson* case said: "It must appear, in all cases of symbolical delivery, that it was the express intention of the parties to make a delivery; that here, as the sample formed no part of the bulk to be paid for, the delivery and acceptance of them would not be a delivery and acceptance of part of the goods sold, within the meaning of the statute."

4. Delivery to carrier.

When there is a valid contract of sale a delivery to a carrier, according to the terms of the contract, vests the title to the property in the buyer.

Allard v. Greasert, 61 N. Y. 1.

It was decided in *Rodgers v. Phillips* (40 N. Y. 519), that a delivery, according to the contract, to a general carrier not designated or selected by the buyer does not constitute such a delivery and acceptance as to answer the statute of frauds.

But it has been held that when the goods have been accepted by the buyer, so as to answer that portion of the statute which requires acceptance, a delivery to a carrier selected by the buyer will answer that portion of the statute which requires the buyer to receive.

Cross v. O'Donnell, 44 N. Y. 661.

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c. Sufficiency of acceptance.

1. In general.

By the construction which the statute of frauds has received, and which its language manifestly required, a mere delivery of the property contracted to be sold by the terms of a void contract, has been held to be insufficient to vest the title to it in, or place it at the risk of the vendee. But, beyond that, it became necessary, under the rule adopted by the statute that some part of the property should not only be delivered and received by the vendee, but that it should also be accepted by him. This acceptance of it involved something more than the act of the vendor in the delivery. It required that the vendee should also act, and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property. He must receive and retain the articles delivered, intending thereby to assume the title to them to constitute the acceptance mentioned in the statute; when that has been done, then, for the first time, the void contract becomes valid and obligatory upon the parties to it.

Rodgers v. Phillips, 40 N. Y. 519.

In *Stone v. Browning* (68 N. Y. 598), goods were sold under an arrangement that they were to be examined by the defendants at their store before they should become liable for the purchase price. The court laid down the rule concerning an acceptance under the statute of frauds as follows: "The receipt of the goods by the defendants at their store under this arrangement was clearly not an acceptance by them. They received them for the express purpose of seeing whether they would accept them or not. Some further act on their part was necessary to constitute an acceptance, which would give validity to the contract of purchase. It was requisite either that they should have made the examination and pronounced it satisfactory, or that they should have dealt with the goods, or done some unequivocal act evincing their intention to accept them unconditionally as their own property, in order to supply the place of a written contract of purchase."

When goods are sold subject to examination, and there is no written contract, *Blackburn*, in his work on Sales at pages 22, 23, lays down the rule as follows: "So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reason at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted them."

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If a vendee does any act with reference to the thing sold, of wrong if not the owner, or of right if he is the owner, it is evidence that he has accepted it.

Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279.

In order to satisfy the statute, there must be a final and absolute appropriation by the purchaser, either of the whole article sold, or of a part thereof. The acceptance must be final, complete and irrevocable. No act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the statute. There must be the acts of the buyer of accepting and actually receiving part of the goods sold, beyond the mere fact of entering into the contract, to bind the latter. The buyer must have exercised his option to receive the goods or not, or having done something that has deprived him of his option, and there can be no acceptance and actual receipt of goods within the statute unless the vendee has had an opportunity of judging whether the goods sent corresponded with his order for them.

Mommer v. Friedlander, 2 City Ct. R. 247.

The act of acceptance is something over and beyond the agreement of which it is a part performance and which it assumes as already existing. It is a fact to be proven as other facts.

Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279.

Under a parol contract for ties a portion thereof was placed upon the vendee's land, and a portion upon land adjoining; vendee's agent for the purchase and inspection of ties moved a few of the latter upon vendee's land for the purpose of clearing out a road; and a small part of the ties were taken by vendee's servants and used upon the road. The court in *Wade v. New York & Oswego M. R. R. Co.* (52 N. Y. 627), in holding that these acts did not constitute an acceptance, said: "No evidence was given that these persons had any authority to make contracts and to accept ties upon contract, on the contrary, it appeared that they were directed to take only such ties as had been inspected and marked. The court therefore erred in refusing to charge that the removal of the ties from the adjoining land on to the vendee's land was not such an acceptance as took the case out of the statute. And the taking of the ties by the vendee's employees for use upon the road was no evidence of an acceptance under the contract; while it might bind the vendee to pay for the ties taken, it did not bind it upon the contract."

In *Durkee v. Powell* (75 App. Div. 176, 77 N. Y. Supp. 368), the defendant made a verbal agreement with the plaintiff to purchase, with other things, certain shades and screens which were in a house just purchased by the defendant on foreclosure sale, the house being occupied by

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the plaintiff as former owner. Thereafter the plaintiff vacated the house leaving the shades and screens; and the defendant took possession of the house including the shades and screens, but refused to pay for them on the ground that they went with the house. The court held that there was sufficient delivery and acceptance to take the case out of the statute.

Where, in an action to recover for needles sold and delivered, it is uncontradicted that the needles were not in fact delivered to the purchaser, but were left on the sidewalk, and he never saw them, but refused to receive them, and returned them to the vendor's place of business, the proof of acceptance is insufficient to authorize a submission of the issue to the jury.

Alfred Shrimpton & Sons v. Dworsky, 2 Misc. 123, 21 N. Y. Supp. 461.

In *Tompkins v. Sheehan* (158 N. Y. 617, 53 N. E. 502), the defendant made a verbal agreement to purchase 1985 shares of stock at a certain price from the five owners thereof. The agreement was made with one of the five owners. A delivery of 1785 shares was made to and accepted by the defendant, the certificate for the other 200 shares not being available at the time. This certificate, which represented the holdings of one of the five owners, was delivered to the defendant a few days later, but was never accepted by him. The court held that the acceptance of the 1785 shares was not sufficient to take the case out of the statute, as the sale of the 200 shares, the individual holdings of one of the five, was a separate transaction, and therefore the agreement as to them could not be enforced in the absence of an acceptance.

Where upon an order for a certain wagon fitted with shafts it was agreed that the vendor would take off the shafts and put on a pole to be furnished by the vendee, provided, however, that the pole would fit, and the vendor on finding that the pole would not fit delivered the wagon alone, there is no acceptance within the meaning of the statute of frauds.

Brewster v. Taylor, 63 N. Y. 587.

In *Bissell v. Balcom* (39 N. Y. 275), defendant purchased cattle from the plaintiff on an understanding that the cattle were to remain with the plaintiff and be taken away as the defendant wanted them. Defendant gave directions from time to time as to the place where the cattle should be pastured and the plaintiff submitted to his authority. While it was not necessary for the court to decide that there was or was not sufficient acceptance to satisfy the statute of frauds, it said: "The argument is by no means trivial, that the acts of the plaintiff, in removing the cattle to the place designated by the defendant, and the defendant's assumption of dominion over them, by directing their removal, submitted to by the plaintiff, warranted the jury in finding delivery and acceptance;

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that, although the cattle remained upon the premises of the vendor in his charge and keeping, yet, he no longer held them as owner, and had no control over them, except as bailee of the purchaser; that the character in which he held possession was changed, and, therefore the jury were justified in finding delivery and acceptance.

In *Heermance v. Taylor* (14 Hun, 149), it appears that the defendant, after boring into and examining several firkins of butter in the plaintiff's cellar, said he would take twenty firkins at the price named, and directed them to be sent to his store. The firkins examined, and enough more to make twenty were delivered to a carman who delivered them to a boat, and when they reached their destination they were turned over to a carman who carried them to defendant's store where they were placed in defendant's cellar. On defendant's return to his store two or three days later he took a customer down cellar and, showing him the lot of butter, bored into one of the firkins, but on examination said, "This will not suit," and then made the sale from another lot of butter. He immediately shipped the butter back to the plaintiff, notifying him that he would not accept it because it was not the butter he purchased. The court held that there was no acceptance.

In *Marsh v. Rouse* (44 N. Y. 643), the plaintiff made a verbal contract with one Wood to purchase 100 barrels of wine and with the defendant to sell the 100 barrels of wine. The three met, and the defendant directed Wood to ship the wine to his consignee in New York. Wood however failed to comply with the directions and kept control of the property. The court held that as there was no vesting of the possession in the defendant as absolute owner, there was no acceptance and receipt.

In *Fitzsimmons v. Woodruff* (1 Thompson & Cook 3), the defendant examined and selected a mantle at the plaintiff's place of business. The plaintiff agreed to place it in defendant's house with different jams or wall pieces as those with the mantle were not satisfactory. In accordance with this agreement the mantle and fixtures were shipped by rail to defendant's station from which to defendant's house they were taken under his direction and put up by plaintiff's servant. The defendant told the workman and the plaintiff that the mantle was not according to contract. The court held that there was no acceptance to take the case out of the statute of frauds.

In *Cooke v. Millard* (65 N. Y. 352), the defendants gave the plaintiffs a verbal order for lumber of certain dimensions, and pointed out in the yard the piles from which they wanted the lumber taken. They also directed that when dressed and cut it should be placed upon plaintiff's dock and notice should be given of readiness to deliver. Plaintiffs pre-

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pared the lumber, placed it on the dock and gave the notice as agreed. The next day it was destroyed by fire and plaintiffs sued to recover the price. The court in holding that there was not sufficient acceptance to satisfy the statute of frauds said: "The acceptance and receipt are both necessary. The contract is not valid unless the buyer does both. These are two distinct things. There may be an actual receipt without an acceptance, and an acceptance without a receipt. The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. It cannot be conceded that there was any acceptance in the present case by reason of the acts and words occurring between the parties after the parol contract, and before the goods were prepared for delivery. There could be no acceptance without the assent of the buyers to the articles in their changed condition, and as adapted to their use. All that subsequently passed between the parties, after the verbal contract was made, was mere words, and had not the slightest tendency to show a waiver of the right to examine the goods to see if they corresponded with the contract. Whatever effect these words might have had in indicating an acceptance, if the goods had been specific and ascertained at the time of the directions, they were without significance under the circumstances, as the meeting of the minds of the parties upon the subject to be selected was necessary."

To constitute such a receipt and acceptance of goods as will take a case out of the statute of frauds there must be a delivery of the goods by the vendor, with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking the possession as owner. Acceptance is an act done by two parties, one of whom is content to deliver, and the other to receive the subject Matter of the contract. *Baker v. Cuyler* (12 Barb. 667). In that case the verbal sale was of the wheat that plaintiffs had left in their warehouse after a certain third party took away 800 bushels. Thereafter, and before the third party had taken his 800 bushels, the defendant (vendee) took 100 bushels without the plaintiffs' permission. The plaintiffs on learning of the act demanded a return of the wheat as the taking was not authorized by the contract. Subsequently the 800 bushels were taken away, and the plaintiffs requested the defendant to take the balance. This the defendant promised but failed to do and the plaintiffs, after selling it, sued for his loss. The court in holding that there was no acceptance said: "The defendant in the present case, in taking the wheat, which

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it is now contended must, by the subsequent mutual assent of the parties be regarded as having been delivered and accepted on the contract, was a trespasser. The plaintiffs might have sued him as such, and recovered the wheat, or the value of it, without regard to the contract. Perhaps also, inasmuch as the defendant in taking the wheat claimed a right to do so under the contract, the plaintiffs might, on learning the fact, have assented to that claim, and thereby rendered the taking a sufficient partial delivery and acceptance to make the contract binding. They did not do so however, but elected to treat the defendant as a wrongdoer, and insisted upon his returning the wheat. But notwithstanding the taking was tortious and the plaintiffs so treated it, they might, in case of a sale of the wheat or of the flour from it, if manufactured into flour, have waived the tort and recovered the proceeds in an action for money had and received. And it was doubtless competent for the parties, by mutual agreement, to treat the transaction as a sale of the portion taken, so as to authorize the plaintiff to maintain an action for the price or value of that portion as wheat sold and delivered. But could they in that mode, by a mere agreement to regard an act as a delivery of part of the wheat sold and a receipt and acceptance of it, which was not such, but was tortious at the time, give vitality to a void contract? There is plausibility, and perhaps force, in the position that the wheat actually taken was not part of the wheat agreed to be sold. The contract related to the wheat which should remain in the warehouse after the 800 bushels sold by contract should be removed; that taken was from the bulk in the warehouse before the removal of the 800 bushels. An agreement to regard the receipt of other wheat than was contracted for, made subsequent to the receipt, as delivered and accepted on the contract, obviously would not satisfy the statute. But aside from this objection, I am unable to bring my mind to the conclusion that any act which was rightfully treated by one of the parties to a contract as a trespass, can, by a subsequent understanding, be made a sufficient partial delivery and acceptance to take the case out of the statute of frauds. Some further act of the parties is in my opinion necessary."

2. Necessity for some overt act.

It is well established that to satisfy the statute there must not only be a delivery of the goods by the vendor, but there must also be an actual acceptance by the vendee with an intention of taking possession as owner, and that this intention must be indicated by some unequivocal act.

Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316.

Pitney v. Glens Falls Ins. Co., 65 N. Y. 6.

Scully v. Smith, 110 App. Div. 88, 96 N. Y. Supp. 908.

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Follett Wool Co. v. Utica Trust & Dep. Co. 84 App. Div. 151, 82 N. Y. Supp. 597.

Drake Hardware Co. v. DeWitt, 142 App. Div. 189, 126 N. Y. Supp. 868.

Acceptance and receipt under the statute of frauds are acts. If they could be performed by words only, then they might be performed by words at the time of the making of the verbal agreement. The purchaser might say, "I have accepted and received the goods," and thus the object of the statute might be thwarted. These words do not mean simply that the buyer is to express in words his satisfaction with the vendor's performance of the verbal agreement. They mean that he is to do something by which he shall actually accept as satisfactory and receive into his possession some part of the goods. (Dedrich v. Leonard, 3 N. Y. S. R. 780; Shindler v. Houston, 1 N. Y. 261, 49 Am Dec. 311; Hallenbeck v. Cochran, 20 Hun, 416.) In the Dedrich case the defendant asked plaintiff to procure him a quantity of hickory sticks called "butts" and deliver them at a certain place on Lake Champlain. The sticks were procured and deposited on the lake shore and defendant and plaintiff went there and measured them. Evidence of the conversation which took place at this meeting was contradictory, but the court held that words could not constitute an acceptance. And it was likewise held in the Shindler case, where the plaintiff, after asking for and receiving an offer from the defendant for certain lumber piled on a dock, said, "The lumber is yours." "Get the inspector's bill and take it to H., and he will pay you," but when the bill was presented payment was refused. And in the Hallenbeck case the defendant agreed to pay the plaintiff \$190.00 for two stacks of hay near one of which the parties were when the bargain was made. The plaintiff said: "The hay is yours," and the defendant said, "Yes." The court held that as there were no acts, nothing but words, there was not such delivery and acceptance as to take the case out of the statute.

In Ham v. Van Orden (4 Hun, 709, 5 Hun, 654), the defendant offered a certain price for some furniture, but on delivery refused to take same. The court in holding that there was no acceptance said: "The mere words for the contract of sale are not acceptance. Acceptance requires that the vendee should also act (not talk), and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property. The defendant did no act whatever, except to make the contract. Some of the furniture was not even present, some was broken, some was in the cemetery. * * * Whatever the mere verbal agreement was, the defendant did no act which can be called an acceptance of the property. It may be that he agreed to accept the furniture. But, as a matter of fact, he did not accept anything.

The statute in regard to acceptance, when the party depends upon that

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to render the sale valid, requires that acts unequivocal should furnish the evidence of such acceptance, and not words alone. The acceptance must be clear and unequivocal. The court will not allow a constructive acceptance to be sufficient. *Ely v. Ormsby* (12 Barb. 570). In that case one Salisbury, who was indebted to the plaintiff on a mortgage, sold the plaintiff a span of horses for \$300.00. As the plaintiff had no stable room Salisbury kept the horses for him a few days. Thereafter Salisbury took the horses to Syracuse to sell, as he testified, for the plaintiff. The court held that there was not sufficient acceptance to satisfy the statute.

3. Acceptance of ponderous and bulky articles.

To prove acceptance and receipt of ponderous and bulky articles by the purchaser, it is not required that there should have been manual delivery by the seller. Virtual or constructive delivery is sufficient, in any case. All that is required is that the goods be placed within the control and under the dominion of the purchaser, with intent on the part of both contracting parties to vest the right of possession as owner in the purchasers, and proof of any act or acts from which it may be reasonably inferred that the seller has abandoned possession as owner, and that the purchaser has assumed it, is sufficient evidence of acceptance and receipt to take an oral contract of sale out of the statute of frauds, without further proof that the goods were actually transferred from one place to another. *Bowe v. Ellis* (3 Misc. 92, 22 N. Y. Supp. 369). In that case there was a verbal agreement between the parties which amounted to a sale of a bar and back bar which were in a building owned by a third party and to which the vendor and vendee had access as licensees. Judge Bischoff in his opinion said: "The chattels were upon neutral ground, in the actual, physical possession of a third person, and so remained when plaintiff requested defendant to remove them, at the same time informing the defendant that they were his. This request was tantamount to a declaration that plaintiff intended to relinquish his lien for the unpaid purchase money, and his dominion of the chattels as owner. Thus there was nothing to hinder defendant from taking possession, if he saw fit so to do. That such was his intention was manifest by his promise to remove the chattels; and that his intention was executed, and dominion as owner assumed by him, was further manifested by his attempted sale to Underhill,—acts which were consistent only with his claim of ownership. Hence there was both receipt and acceptance by defendant, whereby the effect of the statute upon the contract of sale was avoided.

4. Acceptance before delivery.

There is nothing in the statute which requires that the acceptance and

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receiving shall be at the same time. Either may precede the other; and, after both have concurred, the statute has been complied with and the contract becomes operative and valid.

McKnight v. Dunlop, 5 N. Y. 537.

Cross v. O'Donnell, 44 N. Y. 661.

Where the verbal order is particular as to the goods, it seems to furnish plausible ground for contending that such selection of the goods may amount to an acceptance, with which the actual delivery, although posterior in point of time, might be coupled by relation, so as to put the whole transaction out of the operation of the statute; but that where the verbal order is for goods of such a price and quality to be sent, it does not satisfy the statute that goods of that quality and price were sent, there being nothing in that case to show the acceptance of them as conforming to the order; but when the identical goods are fixed upon, there is then something to show acceptance, by the acts of the vendor.

Outwater v. Dodge, 6 Wend. 397.

Some act or conduct on the part of the vendee manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to satisfy the statute; and all this is supplied when the vendee selects a particular article and agrees to pay a certain price for it when it is delivered; for when it is delivered, it is the article which he accepted, and agreed to pay the stipulated price for. If the acceptance had to be, by some act, upon or after the delivery of the article, it might be otherwise; but as the acceptance may precede the delivery, there is, in such a case, a previous act of the buyer showing his acceptance of the identical article.

Caulkins v. Hellman, 47 N. Y. 449.

If a man goes into a store and selects a particular article of household furniture at a certain price, which he agrees to pay when it is delivered, and the proof is that that particular article is delivered, it is, in the absence of evidence of any objection on his part, to be assumed that there was both a delivery and acceptance of the article within the meaning of the statute. United States Reflector Co. Rushton (7 Daly, 410). The sale in that case was of four chandeliers which the vendee saw and for which he agreed to pay a certain sum when they were put up.

In Victor v. Stroock (15 Daly, 329, 5 N. Y. Supp. 659), plaintiffs sold defendants ten cases of goods called "chinchillas" for seventy cents per yard. One of the defendants with a salesman examined the goods before delivery, and agreed to the price stated. The court held that this was a sufficient acceptance although it was prior to the delivery if the identical article was delivered.

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5. Purchase by sample.

In *Johnson v. Smith* (Anthon's N. P. 60 [2nd ed. 81]), the court held that the acceptance of samples of sugar which formed no part of the bulk to be paid for, would not be an acceptance of part of the goods sold, within the meaning of the statute.

Caulkins v. Hellman (47 N. Y. 449), is a case where the purchase was by sample. The verbal agreement was for wine in casks. The casks were delivered at the railroad station, from whence they were sent to the vendee in New York, where they were received by him, and deposited in his cellar, but not accepted as corresponding with the sample, for the vendee immediately, upon the receipt of the wine, attempted to send a telegram to the vendor, to the effect that he declined to accept the wine—which the judge, erroneously as was held, excluded upon the trial, because, though it never reached the vendor, it bore upon the question of the acceptance of the wine, and was an act on his part explaining and qualifying his conduct in receiving the wine into his cellar. The court held that the vendee was not concluded by the sending of the wine to him by railroad, and by putting it in his cellar when it came, as he had the right to refuse it, if, in his opinion, it did not conform to the sample, and as there was no agreement in writing, and could be no valid contract unless he accepted the wine when it was sent to him; he was not bound; there never having been any act on his part manifesting any intention to accept the wine, as corresponding with the sample, either before or after it was delivered to him.

In *MacEvoy v. Aronson* (46 Misc. 622, 92 N. Y. Supp. 724), goods which were sold by sample were retained three weeks and the court held that acceptance could be inferred from the length of such retention. The court said: "The sale was by sample, and in such a case the law requires that the vendee shall examine the goods promptly, and that he cannot unreasonably delay his rejection if the goods be found not equal to the sample. If he proposes to repudiate the sale because it is claimed to be void under the statute of frauds, his acceptance will be inferred from continued retention of the goods after receipt."

In *Fein v. Weir* (129 App. Div. 299, 114 N. Y. Supp. 426), the evidence showed that certain goods were ordered of traveling salesman on samples, and were sent subject to inspection and approval. The court said that delivery of the goods to a common carrier could not be held to be an acceptance.

6. Retention of possession by vendee.

A long and unreasonable delay in returning goods constitutes strong
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evidence of acceptance. *Jones v. Reynolds* (120 N. Y. 213, 24 N. E. 279). In that case there was a verbal sale of an invention accompanied by the delivery of a model, which the purchaser retained for over a year without returning or offering to return it. The court said that it could not be held as a matter of law that the purchaser did not accept and receive the thing sold.

In *MacEvoy v. Aronson* (46 Misc. 622, 92 N. Y. Supp. 724), goods which were sold by sample were retained for three weeks and the court held that acceptance could be inferred from the length of such retention. The court said: "The sale was by sample, and in such a case the law requires that the vendee shall examine the goods promptly, and that he cannot unreasonably delay his rejection if the goods be found not equal to the sample. If he proposes to repudiate the sale because it is claimed to be void under the statute of frauds, his acceptance will be inferred from continued retention of the goods after receipt."

7. Property in vendee's possession.

In *Dorsey v. Pike* (50 Hun, 534, 3 N. Y. Supp. 730), it appears that at the time of the alleged verbal agreement of sale of certain machinery it was at the defendant's quarry under an arrangement by which the plaintiff had rented it for use there. The court said that the fact that the property was in the possession of the defendant at the time of making the contract furnished no evidence of acceptance in its support, and in the absence of some act or conduct on the part of the defendant, in respect to the property, which would manifest an intention to accept the machinery pursuant to or in performance of the contract of purchase, there would be no acceptance. As there was evidence tending to show some use of the machine after the verbal sale the court held that the question of acceptance was one of fact for the jury.

Where a bailor agrees to sell to his bailee wool in the latter's possession, and thereafter the bailee removes the wool and stores it with a warehouse company, it has been held that this is not sufficient delivery or acceptance to take the case out of the statute in the absence of some affirmative act on the part of the bailor subsequent to the agreement to sell.

Follett Wood Co. v. Utica Trust & Dep. Co., 84 App. Div. 151, 82 N. Y. Supp. 597.

Where a debtor places property in the possession of his creditor to dispose of and apply the proceeds in payment of the indebtedness, and thereafter the debtor's assignee verbally accepted an offer of the creditor to take the property in satisfaction of a note which formed part of the in-

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debtedness, but such agreement is not supported by any act of the parties, there is not sufficient acceptance to satisfy the statute.

In re Hoover, 33 Hun, 553.

8. Acts of ownership by vendee.

Acts of ownership constitute strong evidence of acceptance. *Jones v. Reynolds* (120 N. Y. 213, 24 N. E. 279). In that case there was a verbal sale of an invention. The purchaser made an application for and obtained a patent for a combination of elements which included this invention. The court said that it could not be held as a matter of law that the purchaser did not accept and receive the thing sold.

In *Gray v. Davis* (10 N. Y. 285), plaintiff sold defendant his stock of goods. After the verbal bargain they took an inventory of the stock, the defendant and plaintiff's clerk calling off the goods while plaintiff made the memorandum under a heading "Davis bought of Gray." After the inventory the plaintiff directed the clerk to hand the keys of the store to the defendant, who said he did not want to take them until morning, that his rent was not to commence till then, and he had no insurance. The plaintiff, however, said he would give him his policies on the stock, and the defendant directed the clerk to take the keys for him till morning which the clerk did. The plaintiff's sign was then taken down in the presence of the defendant. The court in holding that there was an acceptance said: "The two principal, and, in my judgment, controlling facts, are the taking of the inventory and acceptance of the keys. The taking of the inventory, with a heading such as it had, viz., a declaration that the respondent had bought the goods of the appellant, was a clear and unequivocal act of ownership. The manner, however, in which the inventory was taken was particularly significant. The respondent himself, with the aid of the clerk, handled the goods, took them into his manual possession, called off the different articles, by doing which he must have specified the quantity and quality of each. The handling and entering in the inventory in this manner, of each parcel of the goods, amounted, under the circumstances, to a designation, and acceptance of it at the price inserted in the inventory. The delivery and acceptance of the keys are still more decisive. That act alone is, according to several cases, a symbolical delivery, and of itself sufficient to take the case out of the statute. I do not, however, place my opinion on the symbol, but on the fact that, after the taking of the inventory, all that remained to be done to render the delivery and acceptance of the stock of goods perfect, was to hand the respondent the keys and for him to receive them, both of which were done. It was the only remaining act which could be done to complete the business. The parties themselves so considered it; for when it was done, the appellant's sign was taken down in the presence of the respondent, and without objection from him.

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

9. Acceptance of part of goods.

That the acceptance of a part of the goods sold by oral contract is sufficient to take the case out of the statute of frauds is well established.

Bradley v. Wheeler, 44 N. Y. 495.

Mackie v. Egan, 6 Misc. 95, 26 N. Y. Supp. 13.

Baumann v. Moseley, 73 Hun, 40, 25 N. Y. Supp. 882.

Brock v. Knowler, 37 Hun, 609.

Van Woert v. Albany & S. R. Co., 67 N. Y. 538.

Schultz v. Bradley, 57 N. Y. 646.

Armstrong v. Cushney, 43 Barb. 340.

Baker v. Cuyler, 12 Barb. 667.

10. Acceptance by one of several purchasers.

Where there is a joint purchase an acceptance by one of the purchasers is binding on all.

Smith v. Milliken, 7 Lans. 336.

11. Acceptance by agent.

The acceptance need not be by the vendee in person; it may be made by his agent, acting under either a general or special authority.

Outwater v. Dodge, 6 Wend. 397.

In *Smith v. Mason* (Anthon's N. P. 164 [2nd Ed. 225]), it was held that a mere shop boy of the vendee could not, without authority, accept tea sold under a verbal contract, so as to satisfy the statute of frauds.

A delivery of goods in pursuance of an order, whether at the store of a factor, on board of a vessel, or to the purchaser himself, is a compliance with the order, and is an acceptance on the part of the purchaser, which whether by him or by his agent, is sufficient to satisfy the statute of frauds.

Outwater v. Dodge, 6 Wend. 397.

Dyer v. Forest, 2 Abb. Pr. 282.

12. Delivery to carrier.

While it is well settled that when there is a valid contract of sale, a delivery to a carrier, according to the terms of the contract, vests the title to the property in the buyer. It has, however, never been decided that a mere carrier designated by the buyer can both accept and receive the goods so as to answer the statute. In most of the cases, where a delivery to a carrier has been held to satisfy the statute of frauds there had been a prior acceptance of the goods by the buyer or his agent. *Allard v. Greasert*

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(61 N. Y. 1). In that case the court said: "A buyer may accept and receive through an agent expressly or impliedly appointed for that purpose. There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act, requiring the exercise of no discretion. But there is no reason for holding that the buyer, in such case, intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents can know nothing. This case furnishes as good an illustration as any. The goods were boxed; the carrier could know nothing about them; and its agents had no right to unpack and handle them. Its sole duty and authority was to receive and transport them. In such a case, it would be quite absurd to hold that the carrier had an implied authority from the buyer to accept the goods for him. If the buyer does not accept in person, he must do it through an authorized agent."

Where the verbal order is particular, both as to the goods and the carrier, it furnishes a plausible ground for contending that a selection of the goods, and designation of the receiver, may amount to an acceptance, with which the actual delivery, though posterior in point of time, might be coupled by relation, so as to put the whole transaction out of the operation of the statute; but where the order is general, not designating any particular goods, but merely directing goods of such a price and quality to be sent, the case will not be taken out of the statute by proof that goods of the quality and price ordered were sent, there being in the latter case nothing to show the acceptance, independent of the proof of the verbal contract; whereas, when the goods are fixed upon, and the carrier named by the buyer, the contract is established upon the evidence of the acts of the vendee.

Outwater v. Dodge, 6 Wend. 397.

Where a purchase of merchandise is made, the goods selected by the purchaser, put in a box and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor and put on board a steamboat designated by the purchaser, to be forwarded to his residence, the sale is complete, and the goods become the property of the purchaser.

People v. Haynes, 14 Wend. 546.

In *Glen v. Whitaker* (51 Barb. 451), the referee found that there was a verbal agreement of sale of a clover machine by plaintiffs to defendant; that a machine of the description of the one mentioned in the agreement was, at the time, pointed out to the defendant and examined by one Shattuck to whom defendant directed the machine to be shipped by rail; that

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

the machine was shipped and received, and was retained by Shattuck with defendant's knowledge. The court held that the delivery by the plaintiff to railroad company of the machine in pursuance of order and direction of the defendant, was a delivery to him, and ipso facto an acceptance by him of the property.

In *Fein v. Weir* (129 App. Div. 299, 114 N. Y. Supp. 426, aff'd 199 N. Y. 540, 92 N. E. 1084), the evidence showed that certain goods were ordered of traveling salesmen on samples, and were sent subject to inspection and approval. The court said that delivery of the goods to a common carrier could not be held to be an acceptance by the consignee.

13. As question for jury.

The rule may be broadly stated, that any act from which it may be inferred that the buyer has taken possession as owner, presents a question for the jury to determine whether the act was done with intent to accept. *Jones v. Reynolds* (120 N. Y. 213, 24 N. E. 279). In that case there was a verbal sale of an invention accompanied by the delivery of a model. The vendee took the model into his possession; retained it over a year without returning or offering to return it; and made an application for and obtained a patent for a combination of elements which included this device. The court said that "in view of these acts on the part of the defendant it cannot be held as a matter of law that he did not accept and receive the thing sold. For each of the acts enumerated were of right to be considered as evidence upon that question. Whether there was an acceptance constituted a fact to be determined" by the jury from all the evidence.

In *Drake Hardware Co. v. DeWitt* (142 App. Div. 189, 126 N. Y. Supp. 868), a cream separator was installed in defendant's creamery under an agreement that it was to be tested in competition with another machine, and accepted if it did "better all-round work." It was claimed by the plaintiff that the decision was to be made by the defendant's butter maker, but this the defendant denied. The court in making its decision assumed that Sloan's (the butter maker) judgment was to be conclusive. The separator was installed July 3, 1906. Sloan, as a witness for the plaintiff, testified that during the month of July he operated both separators for a few days at a time alternately, and took occasional tests while doing so; that he operated the plaintiff's machine during August; that about the last of August he received a letter from one of the defendants, notifying him not to operate it longer; and that he did not do so until after the time when the action was commenced. He further testified that thereafter he operated it until March, 1907, when he left the service of the defendants, although there is evidence that he admitted that in thus operating it he was acting contrary to the defendant's instructions. It does not appear that the de-

Sufficiency of delivery, receipt and acceptance of personal property under Statute of Frauds.—Continued.

defendants were aware of Sloan's disobedience, as they were only at the creamery at rare intervals. The court held that testimony as to occurrences subsequent to the commencement of the action was inadmissible because if the defendants had not then accepted the machine, they had not done so since, for the reason that by their answer, and by their resistance of the action, they had been disclaiming liability to the extent of their power to do so. The court further says: "It appears that Sloan had an interest in the sale of plaintiff's machines. Sloan testified at the trial that plaintiff's machine "did the best all-round work;" but it does not appear when he reached that conclusion. He may have reached it after the commencement of the action. Neither does it appear that he ever communicated his conclusion to the defendants. * * * The evidence falls far short of showing that Sloan, before the action was commenced, had reached the conclusion that plaintiff's machine was "the best all-around" machine, or that he so informed the defendants; and if he had reached that conclusion, it was a question whether it was an honest conclusion, in view of his interest in plaintiff's business. It is true the defendants did not offer to return the machine; but they gave orders to Sloan in the latter part of August not to use it, and the mere fact that it remained in their possession until about the 1st of October, under orders by them that it should not be used, is not necessarily indicative of a purpose on their part to accept it. In any aspect of the case, the question of acceptance was an important question to be submitted to the jury."

(*Court of Appeals, June, 1913.*)

PEOPLE, Appellants, v. ROSENHEIMER, Respondent.

(209 N. Y. 115, 102 N. E. 530. *Rev'g* 146 App. Div. 875, 130 N. Y. *Supp.* 544.)

1. Pleading — Indictment — Demurrer.

A demurrer must lie if at all to the whole of an indictment.

2. Statutes — Construction — Two offences.

Subd. 3 of § 290 of the Highway Law which provides that "any person operating a motor vehicle, who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and

***Note.* — Constitutionality of statute requiring operator of motor vehicle who has caused an injury to identify himself.**

The text case is the first in this state which has raised the question of the constitutionality of § 290, subd. 3 of the Highway Law, which makes it a felony for a person who has caused an injury by the operation of a motor vehicle to leave the place of the injury without leaving his name, residence and license number. This statutory provision forms a part of a new article in relation to motor vehicles inserted by way of amendment to the highway law. Section 295 of article 11 of that law (Laws of 1909, ch. 30, being chapter 25 of the Consolidated Laws), repealed by the law considered in the text case provided that "in case of accident to a person or property on the public highway, due to the operation thereon of a motor vehicle, the person operating such vehicle shall stop, and, upon request of a person injured or any person present, give such person his name and address, and if not the owner, the name and address of such owner," while section 307 of the same law made a violation of this provision a misdemeanor. These provisions followed by a few years the extensive use of motor vehicles and first appeared in 1904. (Laws of 1904, ch. 538.) Similar laws were enacted at about the same time in Maine, New Jersey, Michigan, Florida, California, and other states.

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street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than \$500.00 or by imprisonment for a term not exceeding two years, or by both said fine and imprisonment," does not provide for two offenses or provide for an offense being committed in two different ways.

3. Statutes — Constitutionality — Highway law — Self incrimination.

Subd. 3 of § 290 of the Highway Law which provides that "any person operating a motor vehicle, who, knowing that an injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injury party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable

Constitutionality of statute requiring operator of motor vehicle who has caused an injury to identify himself.—Continued.

Mr. Presiding Justice Ingraham, in his dissenting opinion in the Appellate Division, said: "The use of motor vehicles has created a new condition in which those using the streets and highways in the state are subjected to serious damage. The Legislature, to protect the citizens of the state and to insure that prompt relief be supplied to those injured and that those causing the injuries could be ascertained, has made it the duty of the one causing the accident to remain and notify the police or a judicial officer. He is not required to give evidence or be a witness, but to stay at the place of the accident or give notice of the accident to the police. Certainly common humanity would impose such a duty, and I cannot believe that a statute which imposes and enforces it would violate the Constitution of this state."

Outside of the state there is but one case which considers the constitutionality of such a statute, and the decision in that case is in accord with the text case. The wording of the statute construed in that case (*Ex parte Kneedler*, 243 Mo. 632, 147 S. W. 983), is as follows: "Any person operating a motor vehicle who, knowing that injury has been caused to a person or property due to the culpability of the said operator, or to accident, leaves the place of said injury or accident without stopping and giving

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by a fine of not more than \$500.00 or by imprisonment for a term not exceeding two years, or by both said fine and imprisonment," does not violate § 6, art. 1 of the State Constitution which provides that no person shall "be compelled in any criminal case to be a witness against himself."

4. Motor vehicles — Highways — Legislative power.

The Legislature may prohibit altogether the use of motor vehicles upon the highways or streets, of the state.

Appeal from a judgment of the Appellate Division, First Department.

Prosecution of Edward T. Rosenheimer for the violation of the Highway Law.

Charles S. Whitman, Dist. Atty., of New York City (*Robert C. Taylor*, of New York City, of counsel), for the People.

Gilbert D. Lamb, of New York City, for defendant-respondent.

Constitutionality of statute requiring operator of motor vehicle who has caused an injury to identify himself.—Continued.

his name, residence, including street and street number, and operator's license number, to the injured party or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station or judicial officer, shall be guilty of a felony punishable by a fine of not more than \$500, or by imprisonment for a term of two years, or by both such fine and imprisonment." In its opinion, the court said: "The section in controversy was enacted for the purpose, doubtless, of preventing those controlling and operating automobiles from concealing their identity by immediate flight from the scene of accident, and also to secure necessary aid for the injured. Therefore it requires those in charge of the vehicle to remain at the place of accident, or give their names and addresses before leaving. There can be no question but that this act, including § 12, is a reasonable exercise of the police power. The petitioner does not contend otherwise. His contention is that, whether reasonable or not as a police measure, it is invalid, because it violates the constitutional provision that "no person shall be compelled to testify against himself in a criminal cause." The

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CULLEN, C. J. The defendant was indicted for violating subdivision 3 of section 290 of the Highway Law, being chapter 374, Laws of 1910, which enacts: "3. Unishment * * * for going away without stopping after accident and making himself known. * * * Any person operating a motor vehicle, who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than five hundred dollars or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment." The demurrer was sustained by the courts below (in the Appellate Division by a divided court) on the ground that the statute was unconstitutional as in violation of section 6, article 1, of the Constitution

Constitutionality of statute requiring operator of motor vehicle who has caused an injury to identify himself.—Continued.

argument is that the driver may be charged with the crime of culpable negligence, and that the information exacted by the statute in question may be used as evidence to establish his connection with the injury. The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. (*State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894.) On the contrary, flight is regarded as evidence of guilt. In the large majority of cases, such accidents are free from culpability. If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and number, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provisions. *St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340. We have several statutes which require persons to give information which would

of the state, which provides that no person shall "be compelled in any criminal case to be a witness against himself," and this is the only question presented by this appeal.

Similar statutes have been passed in other states, and it has been literally reproduced in the laws of the state of Missouri. The theory on which the learned trial judge proceeded was

Constitutionality of statute requiring operator of motor vehicle who has caused an injury to identify himself.—Continued.

tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription list. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods. *St. Joseph v. Levin*, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101. If the law which exacts this information is invalid, because such information, although in itself no evidence of guilt, might possibly lead to a charge of crime against the informant, then all police regulations which involve identification may be questioned on the same ground. We are not aware of any constitutional provision designed to protect a man's conduct from judicial inquiry, or aid him in fleeing from justice. But, even if a constitutional right be involved, it is not necessary to invalidate the statute to secure its protection. If, in this particular case, the constitutional privilege justified be refusal to give the information exacted by the statute, that question can be raised in the defense to the pending prosecution. Whether it would avail, we are not called upon to decide in this proceeding." And in conclusion, the court said: "Common observation and experience show that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for state regulation. Every person who operates or uses a motor vehicle must be regarded as exercising a privilege, and not an unrestricted right. It being a privilege granted by the legislature, a person enjoying such privilege must take it subject to all proper restrictions. We cannot hold invalid this statute imposing a proper restriction, because of its suggested possible relation to a possible criminal prosecution."

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that the statute in effect required the person operating the motor to furnish evidence tending to prove him guilty of a crime, for if the injury to a person was the result of the culpable negligence of the operator, the latter was guilty either of an assault or of a homicide, depending on whether the injuries inflicted were fatal or not. The indictment contained two counts, the first charging the injury to persons named therein to be due to the defendant's culpability; the second, that it was due to accident.

A demurrer must lie, if at all, to the whole of an indictment. The second count negatives any criminality on the part of the defendant, thus charging a case in which the defendant would not be liable for any criminal prosecution. However, in my opinion, the statute does not provide for two offenses, or provide for an offense being committed in two different ways. The object of the provision, "Knowing that injury has been caused to a person or property due to the culpability of said operator or to an accident," is to make the statute more clearly applicable to all cases however caused than would be apparent if these words were omitted. The question then is whether a statute which requires a person to report the happening of an occurrence which may, though not necessarily must, involve a crime on his part is a violation of the constitutional provision referred to.

The statute does not require the operator of the motor vehicle to state the circumstances of the occurrence tending to show his responsibility, but merely to stop and identify himself. Undoubtedly it does require him to make known a fact which will be a link in the chain of evidence to convict him of crime, if in fact he has been guilty of one. Whether the compulsory furnishing of such a link is a constitutional violation may be questioned. The learned judge who wrote for the minority of the Appellate Division has presented in his opinion a very strong argument in support of the proposition that the statute is a valid exercise of the police power apart from considerations of the peculiar character of a motor car. Since the decision of this case in the Appellate Division the question has been pre-

sented to the Supreme Court of Missouri which, in a very forceful opinion, adopted the view entertained by the judges who dissented in this case in preference to that of the majority. *Ex parte Kneedler*, 243 Mo. 632, 147 S. W. 983, 40 L.R.A.(N.S.) 622. In the opinion of the learned court of Missouri reference is made to statutory enactments, at least partially similar in principle to that before us, the validity of which has either been upheld by the courts or has never been questioned. As to motor vehicles, laws requiring the registry of the names of their owners and chauffeurs and the display of the numbers of the vehicles in a conspicuous place thereon for the very purpose of identifying the car and the person operating it have been upheld. *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 69 L.R.A. 345, 5 Ann. Cas. 790. See *Frankford v. City of Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242; *St. Louis v. Williams*, 235 Mo. 503, 139 S. W. 340. Physicians are required to report deaths and their causes, druggists the sale of poisons, and failure to comply with these requirements is made a misdemeanor. Penal Law (Consol. Laws 1909, c. 40) § 1743; Public Health Law (Consol. Laws 1909, c. 45) § 235. Labor Law (Consol. Laws 1909, c. 31) § 87, requires a person in charge of any factory to report to the commissioner of labor all deaths, accidents, or injuries, and the details thereof. Compliance with any of these statutory regulations may, in the case of the commission of a crime by the person who is required to make the certificate or registry, prove an important factor in leading to his detection; but this is not sufficient to render the legislation invalid. Whether, as claimed by the respondent's counsel, the statute before us goes so much further in the way of self-incrimination as to render the illustrations referred to inapplicable, it is not necessary to definitely determine.

There is one ground upon which, in my opinion, the validity of the statute can be safely placed. The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state. It has been so held in *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512, and *Commonwealth v. Kingsbury*, 199 Mass. 542, 85 N.

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E. 848, 127 Am. St. Rep. 513. Doubtless the Legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle, on account of its size and weight, of its great power and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion. The fatalities caused by them are so numerous as to permit the Legislature, if it deemed it wise, to wholly forbid their use. *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. Ed. 323; *People v. Persce*, 204 N. Y. 397, 97 N. E. 877. If the Legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure any one in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the Legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway, or even that in its operation injury to persons or property shall be a crime but only that failure by the operator, in case of such injury, to identify himself shall be criminal. I cannot see why the greater power does not include the less. Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a privilege the Legislature may prescribe on what conditions it shall be exercised. This principle was recognized by us in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156. In that case we conceded

that in a work of such a nature that the Legislature might prohibit its exercise altogether; it might prescribe the terms on which it could be carried on. It is in this respect that the case before us differs vitally from that of *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 90 N. E. 829, 27 L.R.A.(N.S.) 141, 134 Am. St. Rep. 871, where it was held unconstitutional to compel a broker to deliver his private papers to the comptroller for examination so that the latter might discover whether the broker had committed a crime in failing to comply with the statute imposing a tax on stock sales. The sale of property (of course we do not refer to exceptional articles, liquors, poisons, and others) is a natural right protected by our Constitution. *People v. Gillison*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465. I do not assert that all constitutional privileges may be waived as a condition to the exercise of privileges granted by the Legislature. Certain ones cannot be waived, but others may. *Vose v. Cockcroft*, 44 N. Y. 415; *Mayor, etc., of N. Y. v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494; *Dodge v. Cornelius*, 168 N. Y. 242, 61 N. E. 244; *Musco v. U. Surety Co.*, 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851. I might hesitate even in a case like the present one in upholding a statute which required the operator of a vehicle to appear and be examined as a witness on the trial of a criminal prosecution against himself for his conduct in the occurrence. But this statute goes to no such extent. It is similar to the statute regulating the places where liquor is sold. They are required, during the hours and days when sales are made unlawful, to keep the places of sale open to the public view, so if the vendor violates the law he may be detected. The validity of this regulation has never been questioned. So, also, a requirement that vendors shall report the sales of liquor and exhibit their books showing such sales has been held not to violate the privilege against self-incrimination. *State v. Smith*, 74 Iowa, 580, 38 N. W. 492; *State v. Cummins*, 76 Iowa, 133, 40 N. W. 124; *People v. Henwood*, 123 Mich. 317, 82 N. W. 70.

The learned counsel for the respondent cites in support of his position the opinion of O'Brien, J., in *Matter of Peck*, 167

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N. Y. 391, 60 N. E. 775, 53 L.R.A. 888. But that opinion, so far as it discusses the question here involved, received the approval of no other member of the court. See erratum in vol. 168 N. Y. It is not necessary to discuss at length the history and nature of the constitutional inhibition against being compelled to testify against oneself in a criminal case. That subject has received a most elaborate review in the opinion rendered by Mr. Justice Moody in the Supreme Court of the United States in *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. It is sufficient to say that to permit its voluntary waiver violates no fundamental guaranty of liberty or personal right. On the contrary, since 1869 in this state, and I think now throughout the whole county, a defendant in a criminal case is permitted to testify in his own behalf; but when he does so he waives his constitutional privilege, and his examination is subject to the same rules as any other witness, and his guilt or bad character may be proved from his own mouth. *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *People v. Webster*, 139 N. Y. 73-84, 34 N. E. 730; *People v. DeGarmo*, 179 N. Y. 130-134, 71 N. E. 736; *People v. Hinksman*, 192 N. Y. 421-433, 85 N. E. 676. Moreover, as already said, the operator is not obliged to report the circumstances from which his culpability may be inferred, and if he be culpable it does not necessarily follow that he has been guilty of a crime. A long distance separates the negligence which renders one criminally liable from that which establishes civil liability. That a defendant can be compelled as a witness to testify to facts establishing his civil liability is unquestionable. This statute does not prescribe any new criminal liability for injury to persons by a motor vehicle. The operator commits a crime only when his conduct is such as would, in any other action on his part producing like results, make him a criminal. The primary object of the statute, in my judgment, is not to convict any person of crime, but to subject him to civil liability. I appreciate that when examined as a witness in a civil suit the defendant might claim his privilege. I also appreciate that the right to justify a disobedience of this statute by proof that

the circumstances rendered him liable to criminal prosecution would be of little advantage to the defendant. He would acquit himself of one crime only by convicting himself of another. Nevertheless, when we bear in mind not only the great danger occasioned by the use of motor vehicles, but also the fact that the great speed at which they can be run enables the person causing injury to readily escape undetected, leaving parties injured in person or property unable to tell from whom they shall get redress, I think it involves no violation of public policy or of the principles of personal liberty to enact that, as a condition of operating such a machine, the operator must waive his constitutional privilege and tell who he is to the party who has been injured or to the police authorities, if indeed, requiring him to give such information is an impairment of his constitutional privilege, which we do not decide.

The judgment of the Appellate Division and that of the Court of General Sessions should be reversed, and judgment rendered for the people, disallowing the demurrer, with permission to the defendant, at his election, to plead to the indictment.

HOGAN, J. (dissenting). The statute under consideration requires a person operating a motor vehicle, knowing that injury has been done to a person due to the *culpability* of the operator, to stop and give his name and residence, including street, and street number, and operator's license number, to the injured party, or to a police officer, or in the absence of a police officer to make a report to the nearest police station or judicial officer. A failure to comply with the statute is made a felony.

The indictment demurred to alleges that the defendant, while operating a motor vehicle, did run into and strike a carriage in which two ladies were riding, which said running into and striking was due to the *culpability* of the defendant, and which resulted in the death of one of the ladies and serious injuries to the second lady. A second count of the indictment states the same facts except that the running into and striking was an accident.

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If the charge alleged in the first count of the indictment were established, the defendant might be convicted of a homicide (Penal Law, § 1052), and he would also be subject to indictment and conviction for a felony for the failure to furnish evidence which might tend to connect or identify him with the homicide by the statute here considered. From the prevailing opinion I quote the following language: "Undoubtedly it (the statute) does require him (the operator) to make known a fact which will be a link in the chain of evidence to convict him of a crime, if in fact he has been guilty of any." For that reason stated, it is my judgment that the statute under consideration is in conflict with section 6 of article 1 of the Constitution, which provides that "no person shall be compelled in any criminal case to be a witness against himself."

In *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 264, 265, 68 N. E. 353, 356, Judge Edward Bartlett, writing, quotes the language of Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia (June 1807) in *Burr's Trial* (1 *Burr's Trial*, 244), on the question whether a witness was privileged not to accuse himself, as follows: "If the question be of such a description that an answer to it may or may not criminate the witness according to the purport of that answer, it must rest with himself, who alone can tell what it should be, to answer the question or not. If in such a case he may say upon his oath that his answer would criminate himself, the court can demand no testimony of the fact. * * * According to their statement (counsel for the United States) a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual pur-

pose accuse himself as entirely as he would be stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." Judge Bartlett continued: "A clearer and more cogent statement of the rule it would be difficult to find." This language adopted by this court would seem to cover the case at bar. The principle therein laid down, it seems to me, has been upheld in other cases. *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 90 N. E. 829, 27 L.R.A. (N.S.) 141, 134 Am. St. Rep. 871.

While the defendant in the case at bar might waive a constitutional provision, and incriminate himself, the Legislature is powerless to enact a law which will require him to waive such a provision involving his personal liberty as a condition precedent to operating a motor vehicle upon the highway. While the conduct of an operator of a vehicle, in the failure to stop and render aid to an injured party, is to be deplored, the remedy here sought to correct the evil is an infringement upon the rights of individuals protected by the Constitution. Such rights it is the duty of courts to preserve, though the legislation may seem desirable to meet certain cases. *Wright v. Hart*, 182 N. Y. 330, 333, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; *Matter of Sherrill v. O'Brien*, 188 N. Y. 185, 198, 81 N. E. 124, 117 Am. St. Rep. 841; *Ives v. South Buffalo Rail-*

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way Co., 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162,
Ann. Cas. 1912B, 156.

The judgment should be affirmed.

WERNER, WILLARD BARTLETT, HISCOCK, CHASE,
and COLLIN, JJ., concur with CULLEN, C. J. HOGAN, J.,
reads dissenting opinion.

Judgment accordingly.

(*Court of Appeals, March, 1913.*)

PEOPLE, Respondent, v. PETTANZA, Appellant.

(207 N. Y. 560, 101 N. E. 428. *Rev'g 145 App. Div. 944, 130 N. Y. Supp. 1124.*)

1. Criminal Law — Conviction — Must be by legal evidence.

A defendant, charged with a criminal offense, must be prosecuted according to the forms of law and his guilt must be established, if at all, by legal evidence, no matter what his origin, his station in life, or his associations may have been, and no matter what other offenses he may have committed.

2. Criminal Law — Kidnapping — Evidence.

On the trial of an indictment charging the defendant with kidnapping, it is error to allow proof that the defendant's sister was concerned in another kidnapping case, where there is no evidence tending to show that there was any connection between the two cases.

3. Criminal Law — District Attorney — Misconduct of — Presenting Improper evidence.

It is grossly improper for the district attorney on the trial of an indictment for kidnapping to call a six-year old boy on the pretense of proving "certain conditions" by him, and then to prove by him that the defendant's sister was concerned in the commission of an unrelated, but similar, crime.

4. Criminal Law — Kidnapping — Evidence — Misconduct of District Attorney.

Evidence to show that the defendant, on trial for kidnapping, unlawfully had dynamite in his possession, an offense with which he was not charged, is inadmissible; and where the district attorney persists in exhibiting the dynamite and examining a witness to prove that it was found in the defendant's room, such conduct will not be disregarded on appeal.

5. Criminal Law — Kidnapping — Evidence.

On the trial of an indictment for kidnapping, it is error to allow

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the district attorney to show, over objection and exception, that the defendant was acquainted with a man of the same nationality, whose picture was in the "Rogues Gallery," and who had sent Black Hand letters and committed other misdeeds.

Appeal from a judgment of the Appellate Division, Second Department.

Prosecution of Stanislaw Pettanza (alias Leonardo Armaeto) for kidnapping.

Charles W. Gould, of New York City, for defendant-appellant.

James C. Cropsey, District Attorney, of Brooklyn, (*Hersey Egginton* and *Edward A. Freshman*, of counsel), for the People-respondent.

MILLER, J. The decision of the Appellate Division was unanimous, but it is necessary to look into the facts to appreciate the effect of the rulings complained of. On the 19th of November, 1910, Joseph Longo, an eight-year old boy, was enticed from near his home at 186 Twenty-fifth street, Brooklyn, and taken to 330 East Sixty-third street, Manhattan, where he was found by an officer on December 8, 1910, in rooms consisting of a kitchen and bedroom, occupied by one Vito Sirisi and his wife, and their two small children. In the interval, his father, Francisco Longo, received four so-called "Black Hand" letters demanding a ransom of \$15,000. Two unidentified men did the taking. The boy, however, knew one of them, who lived in the neighborhood of his home. There was no direct evidence tending to connect the defendant with the taking. The boy testified that the third day after the kidnapping, the defendant called at Sirisi's rooms, knocked, said something like "peep" and, when admitted, conversed with Sirisi, inquired of the boy his name and address, and wrote in a book; and that he called on two subsequent occasions, once with another man, and held conversations with Sirisi which

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the boy was not permitted to hear. When the boy was found by the officer and taken down to the street, he pointed out the defendant in the crowd which congregated. The officer testified that thereupon the defendant started to run away but was overhauled by him in two steps. When arrested, the defendant denied knowing the boy and told a rather vague and unconvincing story in an attempt to account for the boy's recognition of him. The defendant with his family occupied rooms in the rear of No. 334 East Sixty-third street. One Castelli and his wife lived in 332 East Sixty-third street. The latter's rooms were connected with Sirisi's by a fire escape and the Longo boy testified that the Castellis and the Sirisis were in the habit of going to and from each other's rooms by means of the fire escape. Two photographs were found in the defendant's rooms, one of the Castellis and the other of the Sirisis and their two children. Eliminating the objectionable evidence, hereinafter discussed, the foregoing is an epitome of the case as made by the People. No attempt was made to prove that the defendant wrote the threatening letters, although the district attorney had a sample of the defendant's handwriting written from the dictation of one of them. The defendant, as a part of his case, put that sample in evidence, and the district attorney now urges that a comparison will show that it was written in the same hand as the said letters. The People's theory is that the defendant asked the boy his name and address to learn where to send them. In that connection the relative dates of that inquiry and the mailing of the first letter were important. The postmark would have shown when the letter was mailed, but, though the district attorney had the envelope, he did not offer it in evidence, and when the defendant called for it he was unable to produce it.

A six-year old boy, Michael Rizzo, who lived in the same neighborhood as the Longo boy, was called by the People, and, without being sworn, was allowed to tell a story of being kidnapped and taken first to a room in No. 364 East Sixty-third street, not one of the rooms occupied by the defendant, and later to the Castellis' rooms in No. 362. It did not appear

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when that kidnapping occurred and there was no evidence tending to show that there was any connection between the two cases or that the defendant was in any way connected with the case of the Rizzo boy. That entire story was received over the objection that it was "incompetent, immaterial and not pertinent to the issue." The district attorney gave the lame reason for calling the Rizzo boy that he was a witness "as to certain conditions," and he had him identify the Castellis by the photograph found in the defendant's room and describe their apparent intimacy with the Sirisis, their going back and forth by the fire escape. It was brought out on the cross-examination of the defendant that Mrs. Castelli was his sister and that the Sirisis, the Castellis and he came to this country from Borghetto, Sicily. It is unnecessary to discuss the proposition that it would have been error to allow the People to prove the commission by the defendant of an isolated and independent crime even of the same character. (*People v. Molineux*, 168 N. Y. 264.) Manifestly, it was error to allow proof that the defendant's sister was concerned in the commission of an unrelated, but similar, crime, and it was grossly improper for the district attorney to call a six-year old boy to make such proof on the pretense that he wanted to prove "certain conditions" by him. The error was intensified by the court in charging the jury as follows:

"The testimony received in this trial bearing upon the alleged kidnapping of Michael Rizzo, who was taken from Brooklyn to No. 344 East 63rd Street, the house in which this defendant lived, and then a few days after taken to the house No. 332 East 63rd street, the adjoining house, the house in which the half sister of this defendant and her husband lived, and there placed under their custody and control, was in support of the contention of the People through the learned District Attorney that those acts taken together with the charges set forth in the indictment, if committed, were part of a common scheme or plan or practice or enterprise embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the other. Proof of extraneous crimes must be

excluded unless there is evidence of system between the offense on trial and the one sought to be introduced. The People contend that the alleged transactions relative to Michael Rizzo were connected with the alleged accusations as set forth in the indictment as part of a general and composite plan or scheme or practice or enterprise, carried on by the defendant and that the acts were so related to each other as to show a common motive or intent running through both."

The difficulty with the theory suggested by the learned court is that there is not a suggestion of evidence to support it, and the district attorney did not advance it when offering the evidence, whatever he may have said in his summation. That part of the charge was not excepted to. However, there would have been no occasion to make it, but for the error in receiving the evidence.

While perhaps the most harmful, the error just considered is only one of many committed on the trial as the result of an obvious effort by the district attorney to make up for the weakness of the People's case by surrounding the defendant with an atmosphere of criminality, which might lead the jury to think that he would not be convicted amiss, whether innocent or guilty of the particular crime charged. If there is such a marked similarity between the defendant's handwriting and that of the threatening letters, as the district attorney now urges, but made no attempt to prove on the trial, it should have been easy, and it should be easy on a new trial, to prove the defendant's guilt by legal evidence. A bare statement of what the record shows with respect to some of the other errors will suffice.

When the officer, who searched the defendant's rooms after the arrest, was on the stand, he was shown an article, and was allowed without objection to state that he found it in the defendant's rooms, took it to the bureau of combustibles to be analyzed, and kept it in water. An objection then being made, the district attorney consented that the evidence be stricken out. He apparently feared, however, that the jury had not yet appreciated that the article was dynamite, and so, for no other

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conceivable purpose except to have more time to flourish it before the jury, he again exhibited it to the witness, who, over objection and exception, was again allowed to state where and how it was found, whereupon the district attorney offered "the substance * * * for identification," and upon the objection being repeated, withdrew the offer, and again consented that the evidence be stricken out. The defendant called as a character witness one John Buzzuffi, who at one time was his landlord and owned the houses Nos. 330, 332, and 334. At the outset of the cross-examination the district attorney elicited the statement that No. 330 was dynamited about two years before.

That witness had stated on direct examination that one Salamoni knew the defendant. On cross-examination the district attorney was allowed to ask if, just before the dynamiting of No. 330, Salamoni had not demanded and been refused a lease of the three houses. The witness answered "No" to that question, but he said that he leased the houses to Salamoni—he was not exactly sure when, but "two years ago about." He was then interrogated at length about Salamoni, and such questions as the following were allowed:

"Q. Don't you know that Salamoni has been arrested twenty times and his picture is in the Rogues Gallery?"

"Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception.

"A. I know that, yes. * * *

"Q. When did the Black Hand letters cease to come to you, what date?"

"Objected to as incompetent, immaterial and improper cross-examination. Objection overruled. Exception."

The answer in substance was that the witness turned the three houses over to Salamoni about two years ago, "after the bomb," and that he received no Black Hand letters after that. and that Salamoni and the defendant were countrymen.

It is manifest that the foregoing are not in the category of technical errors, not affecting the substantial rights of the parties, which are to be disregarded on appeal. Any native

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of Sicily, who lived in the same neighborhood and knew the Sirisis and the Castellis well enough to call upon them and have their photographs, could have been convicted by such methods, however innocent he might have been of the crime charged. An argument is addressed to us, based on the assumption that the nature of the crime tends to excuse, if not wholly to justify, resort to such methods. But the atrocity of the crime charged does not justify a disregard of rules of law, firmly established in our jurisprudence for the protection of all alike. The defendant was not to be convicted of the crime of kidnapping the Longo boy, with which he was charged, because his sister was intimate with the Sirisis, or had herself been concerned in another kidnapping case, or because he unlawfully had dynamite in his possession, an offense with which he was not charged, or because he was acquainted with a man of the same nationality, whose picture was in the "Rogue's Gallery" and who had sent Black Hand letters and committed other misdeeds. A defendant charged with a criminal offense must be prosecuted according to the forms of law and his guilt must be established, if at all, by legal evidence, no matter what his origin, his station in life, or his associations may have been, and no matter what other offenses he may have committed.

The judgment of conviction should be reversed and a new trial ordered.

CULLEN, Ch. J., GRAY, WILLARD BARTLETT, HIS-
COCK and HOGAN, JJ., concur; CUDDEBACK, J., dis-
sents.

Judgment of conviction reversed, etc.

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*(Court of Appeals, October, 1913.)***PEOPLE**, Respondent, v. **CUMMINS**, Appellant.

(209 N. Y. 283, 103 N. E. 169. *Affg* 153 App. Div. 93, 138 N. Y. Supp. 517.)

1. Criminal Law — Misconduct of District Attorney — Opening address.

It is not legal error to refuse to instruct the jury at the close of the district attorney's opening address that such address should not be confounded with the evidence and that the district attorney's duty in opening the case was simply to state what he intended to prove, where no particular passage of the address is pointed out as objectionable or unwarranted, and the request is not subsequently renewed.

Note. — Misconduct of counsel in criminal cases.

- a. *In general*, 93.
- b. *In opening address*, 97.
- c. *In presentation of evidence*, 101.
 - 1. *In general*, 101.
 - 2. *Reference to former conviction*, 101.
- d. *In summing up to jury*, 102.
 - 1. *In general*, 102.
 - 2. *Reference to failure to produce testimony*, 108.
- e. *Necessity for exception to improper remarks*, 111.
- f. *Correction by court*, 112.

a. *In general*.

It is difficult to lay down an inflexible rule applicable to irrelevant statements by the public prosecutor to the prejudice of the defendant. In some cases it is manifest they do no harm. In others, where the case depends upon a mass of circumstances, many of which are contradicted, others equivocal except as light is reflected upon them by their association, it is more important that nothing but proven and relevant facts should be brought into the whole field of observation from which the jury

2. Criminal Law — Misconduct of District Attorney — Address to jury.

While mere vituperation can never receive judicial sanction, it cannot be complained that the district attorney, upon the trial of an indictment for stealing \$140,000, called the defendant a thief.

3. Criminal Law — Application of Code Crim. Proc. § 542 to defendant — Unfair trial.

Code Crim. Proc. § 542 which provides that "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties," has no application in behalf of an appellant in a criminal case in the court of appeals, where the only questions which can be considered (except in capital cases) are questions of law raised by exceptions. And in the absence of such exceptions the court cannot interfere with the judgment on the ground that the defendant has not had a fair trial.

4. Witnesses — Credibility — Previous conviction — Opinion of trial judge qualifying effect of — Admissibility.

The opinion of a trial judge, expressed when he was imposing sentence, that neither he nor the jury regarded the defendant as a criminal or a person of criminal tendencies, is not admissible to qualify the effect of a previous conviction upon the credibility of a witness.

Misconduct of counsel in criminal cases.—Continued.

are to deduce their conclusion. And as the field enlarges it is more important that care should be taken to prevent the mingling of mere statement with fact.

People v. Smith, 162 N. Y. 520, 56 N. E. 1001.

The district attorney, representing the majesty of the People, and having no responsibility, except fairly to discharge his duty, should put himself under proper restraint, and should not in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of a reasonable moderation.

People v. Greenwall, 115 N. Y. 520, 22 N. E. 180.

In *People v. Froelich* (96 N. Y. Supp. 488), certain remarks to the jury by the prosecuting attorney were brought to the attention of the appellate court, but it was held that the evidence was so clear respecting the guilt of the defendant that the remarks were not of sufficient importance to compel a reversal of the judgment.

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People v. Cummins.**5. Criminal Law — Appeal — Unanimous affirmance — Assumption of evidence.**

Where there is an unanimous affirmance by the Appellate Division the Court of Appeals is obliged to assume that there was evidence bearing upon the commission of the crime as charged in each count of the indictment.

6. Criminal Law — General verdict — Bad counts — Effect.

A conviction under a general verdict is not rendered erroneous by the presence of bad counts in an indictment provided some of the counts are good.

7. Criminal Law — Statement of grounds of objection — Appeal.

While the grounds of an objection should not be stated at inordinate length, they should be clearly and fully specified to make the objection available on appeal.

8. Criminal Law — Appeal — Constitutional objection to evidence — necessity for specifying.

The court on appeal will not deem that the constitutional objection that the evidence would incriminate the witness was taken in any instance except where it was expressly brought to the attention of the trial court, although the trial court erred in stating to counsel that it was not necessary to state at length the ground of his objection, when he attempted to state the ground of objection after pre-

Misconduct of counsel in criminal cases.—Continued.

Since this note was prepared the Appellate Division handed down a decision in the case of *People v. Myer* setting aside the verdict of the jury, because of the improper remarks and misconduct of counsel. The following, taken from the *Rochester Union & Advertiser*, is therefore inserted here as a part of this note:

"Presiding Justice Kruse wrote the opinion and in it he says that while the judge who presided at the trial was eminently fair, impartial and clear in his charge and did his best to give the defendant a fair trial, he cannot resist the conclusion that the verdict was the result of unfair acts of the counsel who assisted upon the trial of the prosecution.

The court then calls attention to some of the alleged unfair acts. During the cross-examination of Manager Wilcox of the Pinkerton Detective Agency counsel incorporated in his question the contents of two letters, which he assumed to read and quote, asking the witness whether he did not write one of them to N. D. Lapham of Geneva, Myer's lawyer, and whether

23, 1910, and were drawn by the Nineteenth Ward Bank to the order of the Carnegie Trust Company, one on the National Reserve Bank for \$5,000; one on the Chase National Bank for \$10,000; one on the Mercantile National Bank for \$25,000; and one on the Empire Trust Company for \$1000,000: It is undisputed that the defendant received the proceeds of these checks and used them to take up various loans to himself and other persons. The checks were indorsed by Robert L. Smith, vice president of the Carnegie Trust Company, and turned over to the defendant who deposited them in his personal account. The principal question litigated upon the trial was whether this use of the checks and their proceeds was authorized or not.

The checks were given ostensibly to effect two loans aggre-

Misconduct of counsel in criminal cases.—Continued.

attorney was stopped here by the objection of defendant's counsel that it was improper, but the objection was overruled. Judge Landon, in referring to this said: "The statement made by the district attorney was thus approved by the court and may have had a prejudicial influence with the jury. If the district attorney had the right to make the proof he proposed he did not make it, and thus may have prejudiced the defendant by a charge he could not or did not intend to support; if the district attorney had no right to make the proof then the charge, although no more harmful to the defendant, was a more reprehensible invasion of his rights. * * * If the court had sustained the objection of the defendant, the jury would have been instructed as to the range of the inquiry. As the court overruled it, they understood the district attorney to be speaking within proper limits, and they might have inferred that they were dealing with an old offender." The judgment of conviction was reversed and a new trial ordered.

The district attorney in opening the case of *People v. Mahoney* (73 Hun, 601, 26 N. Y. Supp. 257), which was a prosecution for arson, stated that the fire in question was the last of four, all burning at the same time. The appellate court held that this was not improper as it was part of the people's case that the prisoner set fire to all the buildings, so on fire, at the same time.

The assistant district attorney in *People v. Van Zile* (73 Hun, 534, 26 N. Y. Supp. 390), which was a prosecution for abortion, in his opening address, stated, that the defendant had been jointly indicted with another,

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gating \$140,000 to the Merchant's & Manufacturers' Securities Company and one Charles A. Moore, Jr., on their unsecured notes. The money, however, according to the theory of the prosecution, was to go to the Carnegie Trust Company for a specific purpose. A considerable quantity of the stock of the Nineteenth Ward Bank and the Twelfth Ward Bank had been pledged as collateral security for certain loans which are described in the case as the Van Norden loans. There was danger that this collateral might suddenly be sold; and to avert that danger the Nineteenth Ward Bank, urged so to do by the defendant and his associates, consented thus to turn over \$140,000 to the Carnegie Trust Company to be used by that institution in paying off the Van Norden loans and acquiring the pledged

Misconduct of counsel in criminal cases.—Continued.

that upon the trial of the latter the defendant became a witness for him, that the indictment upon which other person was tried contained but one count, charging that abortion had been committed by means of mechanical appliances, but upon the trial it was disclosed that the defendant had given a prescription which was to aid in producing the abortion, that it then became necessary to reindict the defendant; and that at the time of the trial he was charged, in two counts, with having brought about the abortion by means of mechanical appliances and also with giving a prescription for the purpose of bringing about the abortion. The court held that the opening was not erroneous, nor in violation of the legal right of the defendant to a fair and impartial trial.

On the prosecution of a police officer for assault, it was held that a statement by the assistant district attorney, in opening to the jury, that the case was not moved at that time because of the then pending "momentous political struggle" but because of the "strenuous efforts" to delay it" until after the 1st of January, probably," affords no basis for a new trial, no exception thereto being taken.

People v. O'Connor, 82 App. Div. 55, 81 N. Y. Supp. 555.

The defendant in *People v. O'Connor* (82 App. Div. 55, 81 N. Y. Supp. 555), was a police officer. The assistant district attorney in his opening stated that, as he was in citizen's clothes at the time of the assault, he was not recognized by the police, who were attracted to the scene, until after he had been laid upon the floor of a nearby saloon; but that as soon as they knew that he was an officer he was put in a chair and bolstered

stock, which it was to hold in trust for the bank. The contention of the defendant, on the other hand, was that no such trust or transaction was contemplated; that the Nineteenth Ward Bank lent the money on the unsecured notes of Charles A. Moore, Jr., and the Merchants' & Manufacturers' Securities Company with the intent and knowledge that it was to be used by the defendant "to protect the general situation," as he called it; that is to say, in furtherance of a scheme which had for its ultimate object the effectuation of a merger between the Van Norden Trust Company and the Carnegie Trust Company. In brief, the position of the defendant upon the trial was that he used the proceeds of the checks, with the consent of the borrowers, precisely as was contemplated by the bank which made

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up, and the "Police Department of the City of New York have been bolstering him up ever since." The court held that as this statement about the Police Department was made in connection with the statement of facts as to what the defendant's fellow officers did at the time of his arrest, the jury must have understood that it related to the conduct of the members of the force who were witnesses and not to the entire department, and was therefore not entirely improper.

In *People v. Doyle* (58 Hun, 535, 12 N. Y. Supp. 836), the court said: "The manner in which the assistant district attorney conducted the prosecution of this case was certainly of a character which should call for the censure of the court, and which requires a reversal of the conviction. In his opening of the case he states to the jury that he was curious to know whether the defendant would go upon the stand, since he had found Lee, and have anything to say about how much money he spent with Lee; that the defendant might listen to prudent counsel and not go on the stand. * * * The remarks made by the assistant district attorney to the jury were a challenge to the defendant which compelled him to go upon the stand, or the fact of his refusal would necessarily be considered by the jury to his prejudice. This the attorney had no right to do. He had no right to advert, in any manner or way, upon the question as to whether the defendant would become a witness. And if he had no right to suggest the fact in his summing up, he had no right to press it upon the minds of the jury at the opening of the trial. It does not appear that there was any attempt, upon the part of the learned judge presiding, to repair the damage done by cautioning the jury in this regard. * * * It seems

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the loan which the checks represented. The issue of fact thus presented was resolved by the jury against the defendant; and in view of the unanimous affirmance by the Appellate Division we cannot inquire into the sufficiency of the evidence to sustain the verdict.

There were six counts in the indictment. The third and sixth counts were withdrawn from the consideration of the jury, who rendered a general verdict of guilty upon the four counts which remained. All of these remaining counts charged the defendant with larceny by appropriating to his own use the four checks which have already been described. The first and fourth counts were in the common-law form, while the second and fifth charged the larceny to have been committed by the

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to us that the action of the assistant district attorney was a clear violation of law which was prejudicial to the defendant, putting him in a false position before the jury, and compelling him to testify when otherwise he might not have done so."

c. In presentation of evidence.

1. In general.

While the court has the power to allow much latitude in the cross-examination of a witness, and while the district attorney many times may be led in good faith and legitimately to enter upon a cross-examination of a witness which proves fruitless and discloses no circumstances impeaching his credibility, there must be a limit to these practices. One of these limits is that a district attorney shall not deliberately, by questions really containing no element of misconduct and by parading witnesses as a challenge to the defendant, create false impressions that he has been guilty of misdeeds when the evidence does not sustain any such conclusion.

People v. Freeman, 203 N. Y. 267, 96 N. E. 413.

2. Reference to former conviction.

The defendant in People v. Greenwall (115 N. Y. 520, 22 N. E. 180), which was a prosecution for murder in the first degree, was a witness in his own behalf, and during his cross-examination the district attorney said in

defendant as an agent, bailee, or trustee. In two of the counts the property was alleged to belong to the Carnegie Trust Company, while in two others it was described as that of the Nineteenth Ward Bank.

Notwithstanding the simplicity of the issues arising upon the indictment and plea, the trial was so conducted as to develop a series of complicated inquiries which have made up a voluminous record, covering upward of 2,500 pages, without taking into account the exhibits. A critical examination of this record has involved much labor but has been demanded by the suggestion of defendant's counsel that he was convicted for wrecking the Carnegie Trust Company rather than for the larceny of the checks specified in the indictment. As a result, I am satisfied

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the presence and hearing of the jury: "I convicted the defendant before and I will do it again." Of this language the court said: "The language was improper; and it may have been a technical violation of § 464 of the Code of Criminal Procedure, which provides that upon the new trial, after a reversal of a former conviction, 'the former verdict cannot be used or referred to either in evidence or on argument.'" The court however held that it did not justify a new trial. To quote: "If the intemperate remarks of the prosecuting attorney in criminal cases, made in the heat and excitement of the trial, and sometimes under the provocation of language used by counsel for the defendant, may always be the foundation for a new trial, the administration of criminal justice will become very uncertain. The district attorney, representing the majesty of the People, and having no responsibility, except fairly to discharge his duty, should put himself under proper restraint, and should not in his remarks, in the hearing of the jury, go beyond the evidence or the bounds of a reasonable moderation. The presiding judge can, however, control intemperate language, or so guide the minds of the jury that it may not have injurious effect."

d. In summing up to jury.

1. In general.

Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed

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that the defense was as much responsible as the prosecution for the wide scope which the inquiry assumed; and I think that the learned trial judge in his charge brought the true issue so clearly and sharply to the attention of the jury that they could not have been misled and must have disposed of the case on its true merits, irrespective of extraneous considerations.

The case has been so elaborately reviewed in the opinions of the Appellate Division that I deem it necessary only to discuss some of the chief points which have been specially emphasized in the arguments in behalf of the appellant in this court.

Under the general proposition that the defendant has not had a fair trial, we are asked to make a novel application of

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to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partizan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

People v. Fidelity, 158 N. Y. 542, 53 N. E. 497.

The district attorney, as a prosecuting officer, is entitled to some degree of license in commenting upon the testimony of witnesses, and the attitude and nature of the defense as disclosed by the evidence. *People v. O'Connor* (82 App. Div. 55, 81 N. Y. Supp. 555.) In summing up in that case the assistant district attorney, after commenting on the change of attitude of the police on discovering that the defendant, who was on trial for assault, was a police officer, said: "Gentlemen, I tell you that that is a scene for comic opera, not for the great city of New York. It out-Deverys Devery." Devery was a public character and the press had given considerable attention to his methods while connected with the police force, but he was not connected with or interested in the defense, and the court held that it presented no error.

During the progress of the trial of *People v. Mull* (167 N. Y. 247, 60 N. E. 629), the district attorney stated to the court in the presence of the jury that one of the jurors had been offered \$300 to vote in defendant's favor. The court instructed the jury to report to him any attempts at bribery, and also told them that what had been said in reference to bribery

section 542 of the Code of Criminal Procedure. That section reads as follows: "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." While conceding that this provision has ordinarily been invoked to sustain convictions where the substantial rights of the defendant have not been invaded, the learned counsel for the appellant contends that it is equally applicable in favor of a convicted defendant; that it imposes upon the appellate court the duty of seeing to it that the defendant has had a fair trial; and that this duty is so all-embracing that, where the record shows he has not had such a trial, it is incumbent upon the appellate court to reverse the judgment even if there be no ex-

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was not evidence in the case, and should in no way affect the final verdict. The district attorney in his summary said: "Why, this does not seem to me to be the trial of Archie Mull. He has been tried and convicted in the minds of everybody who has heard this testimony. No other person has been accused or suspected, directly or indirectly, of the commission of this atrocious crime. There is no doubt of his guilt. Not one of the men who sit before me in those chairs has a doubt, either reasonable or unreasonable, as to who committed this atrocious, fiendish crime. A failure by you, gentlemen, to convict this man of this crime which has been so clearly proven against him, cannot fail to excite widespread comment and indignation among the whole body of citizens of this county. Of course it is always the hope of a man accused of murder in the first degree to find one jurymen to stick out and bring about a disagreement to save his life. I know that. I know that is the only hope of this accused, but if there is a man before (among) you who will be so callous to public opinion and to the respect of his fellow citizens, who would be so forgetful and reckless of his oath, so negligent and heedless of the welfare of his family, as to say that Archie Mull did not commit this crime, then I am deceived. Now I have made considerable and extensive inquiry, carefully at a considerable expense, from a great number of your neighbors concerning each one of you that sits there. You probably observed that I had a little history here of each one of you. I know a good deal more about you than you think I do concerning your habits and your characteristics, and your reputation in the community in which you live. And this is concerning every man who sits in these chairs. I could not let any other person sit. It has

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ceptions whatever directed to the alleged error or errors. I think that this view is based on a misapprehension of the purpose and scope of the Code provision. Under the criminal procedure which formerly prevailed, reversals were common for technical errors which really had not affected the result; and it was to do away with this evil that section 542 of the Code of Criminal Procedure was enacted. It has no application in behalf of an appellant in a criminal case in the Court of Appeals, where the only questions which can be considered (except in capital cases) are questions of law raised by exceptions. *People v. Grossman*, 108 N. Y. 47, 52, 60 N. E. 1050, and cases there cited. In the absence of such exceptions in a case like the present, this court has no power to interfere with the judgment

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been reported to me that you are very decent, square, upright, honest men. And if there is a man that sits in those chairs that is willing to brand himself with suspicion by saying that Archie Mull did not commit this crime, my judgment of his character is not at all correct. It seems strange in a community that three hundred men should be called to come here from all the various departments of domestic and business life, to pass upon the guilt or innocence of this man, were it not in this county where there seems to be a growing sentiment on the part of jurors to be lax in the enforcement of the law; were it not for that fact a jury could be secured from the ordinary panel, and try this plain and simple case; but when it reaches a point that another list from this county must also be exhausted to convict a man of crime so atrocious, so wicked, so wanton, so unparalleled and so unheard of in all history of crime as this, where there is no defense, it is strange. And in this case there is no doubt. You are not asked to rely on circumstantial evidence, but it is one where an eye-witness comes and carefully tells you who committed the horrible and cruel killing. It is no wonder that your neighbors have concluded that the integrity and decency of this panel of jurors, instead of Archie Mull, is on trial here to-day. Don't let it be said, don't let it be said, I beseech you, that twelve honest men cannot be found within the borders of Rensselaer county; don't let it be said of you that, from all the integrity and virtue and respectability of this great county, twelve men cannot be gotten together who will do justice. A failure to convict in this case, where there is no defense and where there is no doubt, cannot fail to create again another epidemic of murder in this county. It cannot fail to bring

on the ground that the defendant has not had a fair trial. The jurisdiction of the court is thus limited, and it may not be broadened by construction.

I would not be understood, however, as intimating that this would be a proper case for the exercise of such power, if we possessed it. Certainly, if the trial had been unfair, that fact would have impressed itself upon the mind of the counsel for the defendant, who participated in it from beginning to end; yet in closing his address for the defense, after expressing his appreciation of the presiding judge as "fair-minded as a justice can be," he said: "This trial has been to me a lesson. It has been a lesson in how a trial should be conducted and I shall cherish it." After this it can hardly be seriously contended

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within our borders hordes of desperadoes and criminals who rely upon the puerile inefficiency and weakness of jurors here, and will select this as a safe field in which to operate. The consequences of your failure to convict in this case, in my judgment cannot be weighed or gauged or measured at all. How could a more brutal, wanton and pathetic tragedy be committed than this? A double murder this was, gentlemen, in purpose and intent, if not in fact. Of course Arthur Snyder survived, not through the mercy of Mull, but of God. It seems to me to have been the purpose of the Almighty, in his stern and inscrutable justice, to have saved the life of this boy to tell you who perpetrated this fiendish and unholy deed. But for this miraculous and almost divine rescue of this eye-witness from the very jaws of death, there might be a failure of justice; but a failure by you now to convict and punish the murderer would seem to me to be a mimicry and mockery against God. It seems to me that this witness's life was preserved for the purpose of telling you who committed the crime in order that this perpetrator might be punished." In passing upon the conduct of the district attorney the court said: "The address of counsel must be upon the evidence and according to the evidence. It is greatly to be feared that the remarks of the district attorney, in view of the former disagreement of the jury, and the positive thought unproven assertions of the district attorney during the episode upon bribery, intimidated the jury. Why should a failure to convict excite widespread indignation? And upon whom would it fall? What juror was willing to be thought callous to public opinion, the respect of his fellow citizens, reckless of his

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that the judgment ought to be reversed on the general ground that the trial was unfair.

At the close of the district attorney's opening address, counsel for the defendant requested the court "to instruct the jury that the opening of the district attorney should not be confounded by them with evidence and that the duty of the district attorney in opening the case was simply to state to the jury what he intended to prove for the purpose of establishing the case that has been brought against the defendant, William J. Cummins." To this request the court responded, "I see no necessity for instruction to the jury at this point," to which denial counsel for the defendant respectfully excepted. It is to be noted that, in the request thus made to the court, counsel did not specify any particular passage in the district attorney's open-

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oath, heedless of the welfare of his family, willing to brand himself with suspicion, unwilling to do justice, and willing to acquit such a murderer whose guilt had been made clear by the testimony of an eye-witness, seemingly saved from death by a miraculous and almost divine rescue, according to the purpose of the Almighty, in order to prevent a failure of justice? Clearly, we ought not to allow a verdict to stand to the securing of which such methods and influences were thought by the public prosecutor to be necessary."

In *People v. Barker* (62 Hun, 622, 17 N. Y. Supp. 16), the district attorney, in his summary, made references to a newspaper article which was not admitted before the jury, stating its character, and characterizing the reputation of the defendant in the community as vile, when there was not only no evidence whatever before the jury to that effect, but the only evidence that was offered tended to exactly the opposite conclusion. The court held that these circumstances were not of a sufficiently grave character in themselves to justify the court in interfering with the verdict, but that "in view of the weight of evidence in favor of the defendant, and the character of the verdict (the verdict was guilty of assault in the third degree, when it must have been second degree assault if the jury believed the complainant), it would appear that some influence other than that which would properly result from a consideration of the evidence determined the verdict." The court reversed the judgment of conviction and ordered a new trial.

ing as objectionable or unwarranted. There had been nothing to suggest that the jury were expected to pay any attention to the speaker's statements except so far as they should find support in the evidence. The language of the court was an intimation that in any event the desired instruction would be untimely at that stage of the trial, and the request was not subsequently renewed. In the brief for the appellant in this court, the opening of the district attorney is characterized as a vituperative address in which the public prosecutor repeatedly denounced the defendant as a thief, compared him to a burglar and pickpocket, and stated that he was a person who was living

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Judge Vann in *People v. Fielding* (158 N. Y. 542, 53 N. E. 497), referring to the prosecuting attorney's address, said: "The average man cannot read the eloquent but inflammatory language of the district attorney without being impressed by it, and it is safe to presume that the effect would be heightened by hearing those words spoken with animation and enthusiasm under the existing circumstances surrounding an important criminal trial. The jury might be told by the court to forget them, but could they forget them? They might be told to disregard them, but how can we be certain that they did disregard them? Moreover, some of the most objectionable language was not alluded to by the court in its charge, and instructions to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence."

2. Reference to failure to produce testimony.

In *People v. Greenwall* (115 N. Y. 520, 22 N. E. 180), the district attorney in summing up said: "Ask Butch Miller, the man who is jointly indicted with the defendant for the murder of Mr. Weeks, where he was on the night of the 15th of March, 1887, and see if he won't tell you he was on DeKalb avenue and opposite the Week's house. * * * The gentlemen on the other side used him as a witness and profited by the experience." Miller was not a witness upon the trial, but seems to have been a witness for the defendant upon the former trial of this case. While the court said that the words of the district attorney should not have been spoken, it held that justice did not require a reversal of the judgment on that account, especially as the attention of the trial court was not called to them, and no objection was made to them at the time they were spoken.

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lavishly and luxuriously in New York without any visible means of support, who needed money and a lot of it and knew where to get it; but nothing of this sort was called to the attention of the trial judge. It was not legal error to refuse the desired instruction at the time when it was requested.

The use of epithets by a public prosecutor in addressing a jury is usually more or less a matter of good taste; and, while mere vituperation can never receive judicial sanction, it would by going very far to call a district attorney to account because upon the trial of an indictment for stealing \$140,000 he called the defendant a thief.

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In *People v. Schermerhorn* (203 N. Y. 57, 96 N. E. 376), a case in which a person was on trial for murder alleged to have been committed by accused while perpetrating a burglary, the court says: "The exceptions taken by the defendant's counsel to the remarks made by the district attorney in the course of his summary were not well taken. The district attorney made it perfectly plain that the defendant was not to be prejudiced by his failure to testify, and he was clearly within his rights in arguing to the jury that the defendant's unexplained possession of the stolen property was evidence which should be considered upon the question whether the defendant committed the burglary, and in the commission thereof perpetrated the murder."

In *People v. Rose* (52 Hun, 33, 4 N. Y. Supp. 787), the district attorney in his address to the jury commented upon the fact that the defendant had not been sworn as follows: "Why has not the defendant been sworn? He could tell where he was this night and"—whereupon the defendant's counsel interposed and asked the court to direct district attorney that he must not refer to the fact that the defendant had not been sworn. The court remarked: "That is so, I don't think he will do so now." The district attorney continued: "Well, gentlemen, that is so; I cannot refer to the fact that Rose has not been sworn, if I could, I could say to you that if he took the stand he could tell you where he was this night and what he was doing." The defendant's counsel again interposed and asked to have the remarks of the district attorney stricken out. The court said: "Strike them out." Defendant's counsel then asked the court to instruct the jury, "that they must disregard the remarks of the district attorney in respect to the fact that Rose was not sworn, and that they could draw no inference against him from that fact; that they could

It is earnestly contended that the defendant was gravely prejudiced by proof of a mass of facts entirely foreign, irrelevant, and immaterial to the issues, occurring both prior and subsequent to the alleged larceny. This point requires and has received careful consideration. I am convinced that it is not well taken.

Much of the evidence thus attacked was properly received as bearing upon the defendant's motive and intent. The learned counsel who represented him in this court concedes that proof that the defendant was indebted to a large amount, that the institutions in which he held stock and was a director were also heavily indebted, and that the Carnegie Trust Company was in an embarrassed condition would furnish a motive for

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not consider it one way or the other; that it creates no inference of guilt." The court remarked: "I do not think the district attorney will go any further." It was held that the district attorney violated the rights of the defendant in commenting to the jury upon the significance of his neglect or refusal to testify in his own behalf, and that as § 393 Code Criminal Procedure declared that the defendant's "neglect or refusal to testify does not create any presumption against him," it was the duty of the court, by proper instruction to the jury, to protect the defendant against the prejudice or inference which the district attorney's remarks suggested.

In *People v. Hoch* (150 N. Y. 291, 44 N. E. 976), a homicide case, the prosecuting attorney in his closing address to the jury said: "The little mound under the snow alone knows, and the defendant will not speak." Defendant requested that the jury be asked to eliminate those words from their minds, or else that they be made a part of the record. The prosecuting attorney expressed a willingness to have them stricken out, and the court so ruled, and also charged the jury that it was of "no legal consequence," that "the defendant did not testify in his own defense. In our country the defendant is not compellable to testify against himself on a criminal charge * * * and our statute further provides that the fact that a person accused of crime declines to take the stand and testify in his own behalf shall not be considered against him." The court held that any prejudice to the accused from the improper allusion to the defendant's silence was fully averted; not only by the action had in the

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stealing and would tend to show that he meant to apply the money procured from the Van Norden Trust Company and the Nineteenth Ward Bank to the payment of his own indebtedness and that of his associates, as well as other obligations due to the Carnegie Trust Company. Nevertheless he contends that, where there is no question, as there is no question here, as to who committed the act alleged to constitute the larceny, the motive with which it was committed is of little consequence; and, although proof of motive may be relevant under such circumstances, yet it should not be admitted if it is otherwise prejudicial to the defendant. In support of this proposition he cites Wigmore on Evidence, § 1863, where it is said: "So, also, if certain evidential material, having a legitimate probative

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presence of the jury in striking it out, but in the pointed remarks of the trial judge in submitting the issue to the jury.

e. Necessity for exception to improper remarks.

Where the objections taken by the defendant's counsel in a criminal case are to the general course pursued by the district attorney, no further objection or exception is necessary when the court sanctions such course.

People v. Fielding, 158 N. Y. 542, 53 N. E. 497.

Where counsel are prevented from excepting to improper remarks of the prosecuting attorney at the trial the court should allow an exception upon appeal.

People v. Fielding, 158 N. Y. 542, 53 N. E. 497.

The Court of Appeals has no jurisdiction to grant a new trial on account of intemperate language used by the district attorney in his address to the jury unless exceptions appear in the record which present questions of law.

People v. Brooks, 131 N. Y. 321, 30 N. E. 189.

The Court of Appeals has power, under §§ 527 and 528 of the Code of Criminal Procedure, to order a new trial, where it appears that the defendant in a criminal case has been prejudiced by the intemperate and improper remarks of the prosecuting attorney.

People v. Greenwall, 115 N. Y. 520, 22 N. E. 180.

value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose." Even if it were otherwise applicable, this doctrine is not available to the appellant here on account of his own course upon the trial, which opened the door to the reception of most, if not all, of the evidence of which he now complains. Early in the case, while a witness for the people was under examination, counsel for the defendant announced that the defense proposed to show that certain stock had been purchased with the money alleged to have been stolen and just what was done with that stock, "how the stock was variously distributed to various banks and institutions in this city, in order to protect loans." A list of the stocks and the disposition which the defendant claimed to have made of them was subsequently furnished to the district attorney. This was designed to show that the proceeds of the checks specified in the indictment had really been used by the defendant in the manner contemplated by those at whose instance they were drawn; and it was to meet and overcome this contention that the evidence in question

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f. Correction by court.

In *People v. Fielding* (158 N. Y. 542, 53 N. E. 497), the court in referring to the prosecuting attorney's improper summary said: "This method of summing up should have been sternly interrupted by the court of its own motion, so as to exclude improper statements and comments from the consideration of the jury, for objections made after the district attorney had said what he wanted to were objections made after the harm was done." And further the court said: "After what took place during the summing up, how can we be sure that the general and placid language of the charge wholly counteracted the pointed and vigorous words of the district attorney, indorsed as they had been by the court itself? When improper evidence has been received or improper statements made in the presence of the jury, if the court seeks to correct them, the correction should be as broad as the error, and cover substantially the same ground."

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became material. It is quite true that some of it was rather remote; but such error as there may have been in this respect is not sufficient to warrant a reversal. The same observation applies to the criticisms upon the latitude permitted in the cross-examination of the defendant and his witnesses.

As bearing upon the credibility of one of these witnesses, Joseph B. Reichman, it was made to appear that he had previously been convicted of making false reports to the state banking department but had been admitted to bail upon appeal, under a certificate of reasonable doubt. The defendant complains because he was not allowed to prove, upon the trial now under review, that the judge before whom Reichman was tried, in his remarks upon imposing sentence, said that neither he nor the jury regarded Reichman as a criminal or a person with criminal tendencies. There is no rule of evidence which renders such an expression of opinion on the part of a trial judge admissible to qualify the effect of a previous conviction upon the credibility of a witness. The certificate of reasonable doubt granted in Reichman's case was received in evidence, but the opinion of the judge who granted it was excluded as immaterial. This ruling also was correct. The reasons which led to the granting of the certificate did not in any sense constitute a fact bearing upon the credibility of the convicted witness. The proposition is urged upon us that the general verdict in this case should not be allowed to stand, because there was no sufficient proof in support of the fourth and fifth counts of the indictment, which, therefore, should have been withdrawn from the consideration of the jury. No request was made that the jury should be instructed to find specifically on each count.

The Appellate Division has expressly held that there was evidence bearing upon the commission of the crime as charged in each count; and in any event the rule of unanimous affirmation obliges this court to assume such to have been the fact.

Finally, on this point, it is settled law that a conviction under a general verdict is not rendered erroneous by the presence of bad counts in an indictment provided some of the counts are good. *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460.

A constitutional question remains to be considered. At the beginning of the trial a motion was made to dismiss ten indictments, including the present indictment against the defendant, on the ground that he had been compelled to incriminate himself, before the grand jury which indicted him, as a witness in a subsequent investigation into a charge of bribery against Charles H. Hyde. This motion was based on an affidavit of the defendant and was opposed by an affidavit of John Kirkland Clark, assistant district attorney, who had been in charge both of the Hyde investigation and the Cummins investigation before the grand jury. In this opposing affidavit Mr. Clark declared that no testimony given by Cummins had been used against him either directly or as the basis of any investigation, "nor did any answer to any question made by the said William J. Cummins elicit any matter which was new or which has been used against him in the preparation of this case for trial." The motion to dismiss the indictments was denied and the denial involved finding as a matter of fact that these statements in the opposing affidavits were true. It is contended in behalf of the appellant, however, that, as the trial proceeded thereafter, the right of the defendant not to be compelled in any criminal case to be a witness against himself (N. Y. Const. art. 1, § 6) was repeatedly violated by the admission of evidence in disregard of that right. Assuming that the objections which were taken sufficed to raise the constitutional question (which I very much doubt), I am convinced that no error was committed, in this aspect of the case, of which the defendant is entitled to complain. No proof was offered or received as to any testimony given by the defendant before the grand jury in the investigation of the Hyde case.

Evidence was offered and received on this trial relating to certain loans concerning which the defendant had testified in the Hyde investigation; but these matters were really brought into the present case by the defendant himself, who cannot justly complain because they were followed up by the prosecution. The only objection was to the materiality and relevancy of this evidence, save in a single instance where the constitu-

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tional ground was specified and the objection was then sustained. It is suggested that counsel for the defendant upon the trial were prevented from specifying the constitutional objection to this evidence by a ruling of the learned trial judge during the defendant's cross-examination, after the court had overruled an objection to the question put by the assistant district attorney. This appears in the record as follows: "Mr. Steuer: Just pardon me a second. The Court: You have got my ruling. Mr. Steuer: May I not state my objection? If you do not want me to, I am perfectly satisfied to abstain. The Court: After all, Mr. Steuer, in a criminal case it is not necessary to state at length the ground of your objection. Mr. Steuer: I understood, your honor, that rule applied only to a case where a man was being tried for murder in the first degree. The Court: It applies to every case. Mr. Steuer: I do not understand that you could argue an appeal without an exception. The Court: I am not talking about an exception. I am speaking of the grounds of the objection. It is not necessary to state the grounds of the objection. You stated your objection and I overruled it. Mr. Steuer: I really did not know that,"

The learned trial judge inadvertently erred in this expression of opinion. While it is true that the grounds of an objection should not be stated at inordinate length, they should be clearly and fully specified to make the objection available on appeal. In the case of *People v. Spiegel*, 143 N. Y. 107, 38 N. E. 284, an objection on the ground of irrelevancy and incompetency was held to be insufficient to raise the point that the evidence objected to was self-incriminating and therefore within the constitutional provision.

In the present case, however, it is plain that the intimation which has been quoted had no serious misleading influence upon the counsel for the defendant, for continually in subsequent parts of the record we find them specifying the grounds of the objections which they interposed.

I think, therefore, that under the circumstances we should not be justified in deeming the constitutional objection to have been taken in any instance except where it was expressly

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brought to the attention of the court. Notwithstanding the complicated mass of proof in this case and the devious paths in which the evidence was occasionally permitted to stray, I am satisfied, after a very careful study of the long record, that the minds of the jurors were clearly directed to the true issues involved; that they were not misled or confused to the detriment of the defendant; and that the case presents no legal error which would justify this court in interfering with the verdict.

The judgment of conviction should be affirmed.

CULLEN, C. J., and WERNER, CHASE, COLLIN, and
CUDDEBACK, JJ., concur. HOGAN, J., not voting.

Judgment affirmed.

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Greener v. General Electric Co.

*(Court of Appeals, June, 1913.)***GREENER, Respondent, v. GENERAL ELECTRIC CO., Appellant.**

(209 N. Y. 135, 102 N. E. 527. Rev'g 153 App. Div. 439, 138 N. Y. Supp. 273.)

1. Evidence — Declaration of injured person — Res gestæ.

A declaration made by one who has been injured, in response to a question as to what has happened, which is not spontaneous but distinctly narrative, is inadmissible as part of the *res gestæ*.

Appeal from a judgment of the Appellate Division, Third Department.

Note. — Admissibility of declarations of injured person immediately after receiving injury.

- a. *Introductory*, 117.
- b. *As part of res gestæ*, 118.
- c. *Length of time between act and declaration*, 125.
- d. *Spontaneous exclamations*, 126.
- e. *Statements as to cause of injury*, 128.
 - 1. *Voluntary*, 128.
 - 2. *In response to inquiry*, 129.
- f. *Statements as to condition*, 130.
- g. *Declarations indicating suffering*, 132.

a. Introductory.

This note does not include declarations or statements made to a physician and admissible only because made to a physician, such as the declarations in *Schuyler v. Third Ave. R. R. Co.*, 1 Misc. 351, 20 N. Y. Supp. 683.

Action by Mary Greener, as administratrix, against the General Electric Company, to recover damages for the negligent killing of the plaintiff's intestate.

James O. Carr, of Schenectady, for defendant-appellant.

Fryer & Lewis, of Schenectady, for plaintiff-respondent.

GRAY, J. This action was brought to recover damages of

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

b. *As part of res gestæ.*

It is not easy always to determine when declarations may be received as part of the *res gestæ*.

Declarations which are received as part of the *res gestæ* are to some extent a departure from or an exception to the general rule; and when they are so far separated from the act which they are alleging to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances. They then depend entirely upon the credit of the person making them and of the persons who testify to them, and hence are of no more value as evidence in a legal proceeding than the unsworn declarations of a person under any other circumstances. Even dying declarations are not received in civil actions unless part of the *res gestæ*. Such declarations made in the immediate presence of death, under the most solemn circumstances, when all motive to pervert the truth may be supposed to have ceased to operate, are received only in trials for homicide of the declarant in cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. It is said that the reasons for thus restricting the rule may be that credit is not in all cases due to the declarations of a dying person, for his body may survive the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or for the sake of ease, and to be rid of the importunity and annoyance of those around him he may say, or seem to say, whatever they may choose to suggest. The rule admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice.

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the defendant for being the cause of the death of the plaintiff's intestate, an employé. In substance, the alleged negligence was that the defendant had provided for the use of its workmen a defective and insecure ladder, in connection with an overhead crane erected in its works, from which the deceased fell, or was thrown, to the floor of the building. The facts disclosed by the evidence were such as to warrant the jurors in finding that the deceased, who was employed as a "rigger," upon the day in question was standing on top of the carriage of the crane, when

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

Anything said accompanying the performance of an act, explanatory thereof, or showing its purpose or intention, when material, is competent as a part of the act. But when the declarations offered are merely narratives of past occurrences they are incompetent.

People v. Davis, 56 N. Y. 95.

To be a part of the *res gestæ*, declarations must be made at the time of the act done, which they are supposed to characterize; they must be calculated to unfold the nature and quality of the acts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act and so connected with it as to be regarded as the result and consequence of co-existing motives.

Tilson v. Terwilliger, 56 N. Y. 273.

The plaintiff's intestate in *Waldele v. New York Central & Hudson River R. R. Co.* (95 N. Y. 274, 47 Am. Rep. 41), was an educated deaf mute. He was killed by one of the defendant's engines. Shortly after the passage of a train and an engine, groans of the intestate were heard, and he was found lying upon the outer track of the railroad about fifteen feet from the sidewalk badly bruised and mangled. He was soon removed to the sidewalk and afterwards to the hospital where he died in about three hours. After he was removed to the sidewalk, his brother, also a deaf mute, was sent for and about thirty minutes after the accident he there obtained from him by signs, the following declaration. The brother testified: "John said he got hit! John said there was a long train, that he stood waiting for it to go, and an engine followed and struck him." The court in holding the evidence incompetent said: "The claim that the declarations can be treated as part of the *res gestæ* is not supported by

he was called to by the crane repairman, from the floor, to come down and to assist in hoisting up a piece of machinery; that, in attempting to comply with the order and to descend from his position, he stepped upon an iron ladder, extending from a crane cage, which depended from the cross-girders on which the crane carriage moved, for the purpose of reaching the lateral girders and of thus using another ladder to get to the floor; that this mode of ascending, or descending, from floor to crane was not prohibited, nor unusual; that the crane ladder, which was bolted to the floor and to the top of the crane carriage, and extended some three or four feet above it, unattached, was inadequate to the strain of the weight of the deceased, when subjected to it on this occasion; that it had bent under him, throwing him to the floor; and that, as the result of injuries then received, he had subsequently died.

Without otherwise referring to the evidence, we think that the judgment appealed from might stand, were it not for a

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

authority in this State. The *res gestæ*, speaking generally, was the accident. These declarations were no part of that—were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations or by which upon cross-examination of the witness testifying, or by the examination of other witnesses, the truth of the declarations could be tested." And further in its opinion the court said: "Here the *res gestæ*, strictly and accurately speaking, was not the fact that the intestate was injured, nor the fact that he was injured by coming in collision with the engine. These facts were apparent and undisputed. But the point of inquiry was, how he came to be hit by the engine, with the view of ascertaining whether the accident was solely due to the negligence of the defendant, or partly, or wholly due to the negligence of the intestate. The manner of the accident was, therefore, the *res gestæ* to be inquired into; and these declarations made after the accident had happened, after the

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serious error committed by the trial court in the reception in evidence of a declaration of the deceased, made to a fellow workman after his fall, and which may have influenced the decision by the jurors of the question of fact. Whatever we may consider to have been the sufficiency of the other evidence, we could, and should, not assume that a declaration, made under such circumstances, may not have had its effect upon the jurors' minds. A witness, also employed as a "rigger," and who was standing a few feet away from where the deceased had fallen, went over to him, and, as he lay there, "asked him what had happened." Over the objection of the defendant, he was then allowed to state what the deceased said, and an exception was taken to the ruling. The witness testified: "When I asked him what had happened, he said: 'My feet is broke; the ladder bent over.'" The admission in evidence of the declarations of an injured person constitutes an exception to the general rule that excludes hearsay evidence, and is only justified when the

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

train had passed from sight, and the whole transaction had terminated were no part of that *res gestæ*, had no connection with it, and were purely narrative. It has been well said, that *res gestæ* must be a *res gestæ* that has something to do with the case, and then the declaration must have something to do with the *res gestæ*. It cannot be said that these declarations were in such manner connected with the *res gestæ* as to constitute one transaction so that they and the *res gestæ* were parts of the same transaction. They were not made under such circumstances that they are in any way confirmed by the *res gestæ*, and they had no relation to what was then present, or had just gone by."

The elaborate opinion delivered by Judge Earl in the Waldele case, *supra*, manifests the tendency of the courts of this state to restrict the admissions of declarations as part of the *res gestæ* in narrow limits and receive them only where their admission can be justified on principle.

The declarations of a party to be competent evidence in his own behalf as forming a part of the *res gestæ* must have been made at the time or shortly after the injury, and they are never competent unless supported by other evidence.

Baker v. Griffin, 23 N. Y. Super. Ct. (10 Bosw.) 140.

declarations are spontaneous utterances, or exclamations. There is no confusion in the decisions of this court upon this question. *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *Martin v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 626, 9 N. E. 505; *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690. In *Waldele v. N. Y. C. & H. R. R. Co.*, the question was carefully considered, and the authorities were reviewed. There, the testimony of a witness as to what the injured person had declared, a few minutes after the accident, as to how it happened, was admitted, and, for the error in the admission, the plaintiff's judgment was reversed. The vice of the evidence was held to be in the declaration being narrative of the past transaction, and thus depending for its truth upon the reliability of the statements of the deceased and the veracity of the witness. The decision was followed in *Martin v. N. Y., N. H. & H. R. R. Co.* In *People v. Del Vermo*, the witness was walking with the deceased and the defendant, when the former fell upon

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In *People v. Leonardo* (199 N. Y. 432, 92 N. E. 1060), the facts show that one Phelps was sent to the defendant's place of business to collect rent; that while he was counting the money paid him he received a stab wound from which he died three days later. After receiving the wound Phelps went out into the street where he was assisted by a car inspector who asked him what happened to him. Phelps replied, "I have been stabbed." The car inspector then asked him where, and Phelps pointing to the place said: "In there." Phelps then asked the car inspector to get his hat. The car inspector told him to "Never mind your hat. Come over and sit down." Phelps hesitated and the car inspector forced him to the side of the street. As they were nearing the curb, Phelps took hold of his coat, and pulled it open, and as he pulled it open, he put his hand into his pocket and said: "The receipts, the receipts, the receipts are gone." Referring to this testimony, the court said: "The testimony so given by the car inspector was a mere statement of facts that at the close of the case were conceded, except the statement that Phelps said: 'The receipts, the receipts, the receipts are gone,' and such statement was an exclamation made by Phelps as he was being led away from the immediate scene of the crime and as he opened his coat and put his hand

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the sidewalk. The witness asked him "What is the matter?" and the deceased answered, "Del Vermo stabbed me with a knife." The admission of the witness' evidence as to this declaration was held proper "as a part of the *res gestæ*, in the broadest sense of the term." Judge Willard Bartlett again considered the question with much care, in the light of our and of other decisions, and held that the testimony was properly received. The declaration so accompanied the occurrence of the assault as to come within the exception to the general rule.

The distinction to be made is in the character of the declaration, whether it be so spontaneous, or natural, an utterance as to exclude the idea of fabrication, or whether it be in the nature of a narrative of what had occurred. In the present case, the declaration of the deceased was not spontaneous; it was called forth by the inquiry as to "what had happened" and was distinctly narrative. As it was observed in the dissenting opinion below, "it was, in effect, a statement that the falling was not

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into his pocket. Such testimony was a part of the *res gestæ* within our decision in *People v. Del Vermo* (*infra*).

In *Patterson v. Hochster* (38 App. Div. 398, 36 N. Y. Supp. 467), which was an action brought to recover damages for the death of the plaintiff's intestate resulting from an injury which is alleged to have been caused by her falling into a coal hole in the sidewalk in front of the defendant's premises, the witness who left the house with the deceased at about dusk accompanied her to the sidewalk. The witness testified that she turned around with her back from the deceased, and that the deceased screamed, "My God!" The witness rushed out and put her hands under her neck. The deceased then said: "Never mind my head, my leg is in the scuttle hole and it is broke." It all happened in less than two or three minutes. The court held that the declaration of the deceased was admissible in evidence as part of the *res gestæ* within even the most restricted authorities. To quote: "It was descriptive of her condition and situation at the very time she made the statement, and therefore contemporaneous."

Matter of Curry (4 City H. Rec. 109), was a prosecution for manslaughter. Early one evening the wife of the defendant ran out of her

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accidental, nor due to the negligence of the plaintiff's intestate, but was due to an occurrence upon which which might be predicated negligence upon the part of the defendant."

For the error pointed out, the judgment must be reversed and a new trial had; costs to abide the event.

CULLEN, C. J., and WERNER, HISCOCK, COLLIN, CUDEBACK and MILLER, JJ., concur.

Judgment reversed, etc.

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

room into a servant's room crying "Murder," and alleging that the defendant had thrown a tea pot at her and murdered her. The court held that the declaration having been made at the time the blow was inflicted was admissible as part of the *res gestæ*.

In *Austin v. Bartlet* (178 N. Y. 310, 70 N. E. 855), the plaintiff's horse was bitten by a dog while she was driving on the street in front of the defendant's residence. It appeared that the horse after he was frightened by the dog ran into the defendant's barn yard where the plaintiff was thrown out and injured. Shortly after the accident the plaintiff led her horse home, a distance of about one hundred twenty rods, and put him in the stable. About thirty minutes after the accident, the plaintiff went back to the place where it occurred to find her pocket book. A tenant of the defendant who resided about sixty-five rods from him, on the same farm, walked home with the plaintiff after she found her pocket book. The court held that self-serving declarations made by the plaintiff at that time, in the absence of the defendant, to the effect that it was the defendant's dog and not the tenant's dog that frightened the plaintiff's horse were a mere narrative of a past transaction and inadmissible as a part of the *res gestæ*.

In *Moorhead v. Eckert* (61 Misc. 612, 114 N. Y. Supp. 31), the appellate term held that evidence of "an exclamation or remark" made by the plaintiff after she had fallen upon the stairs was properly excluded since there was nothing in the record when the testimony was offered to justify an inference that a remark then made was spontaneous in character. The court further said that from the plaintiff's own testimony, it appeared that she was fully conscious and in no condition of distress such as would take from her utterances the quality of deliberation. Hence any state-

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

ment by her bearing upon the cause of the accident which the question involved would have been but a narration of past events, a self-serving declaration, and not of the character of proof admissible as part of the *res gestæ*.

In *Kennedy v. Rochester City & Brighton R. R. Co.* (130 N. Y. 654, 29 N. E. 141), the plaintiff was injured as a result of a fall from the platform of one of the defendant's street cars. In holding that complaints made by the plaintiff after she reached home were inadmissible, the court said: "Now, in this case, between the time of the accident and the declarations of pain, plaintiff had walked in a direction opposite to her home to the street-car barns and listened to the conversation which her sister had with the superintendent; then she walked up State street several blocks along which cars were passing every few minutes to 'the four corners,' where she took a car to Hubbell park, and then walked two blocks home. Certainly it cannot be asserted that this conversation was an incident of the injury in the sense that it emanated immediately from it, or that it stood in any immediate causal relation to the act of falling and its first effect, or that it was not so far separated from the occurrence as to admit of the formation of a plan to strengthen plaintiff's case against the defendant."

Declarations which are no part of the *res gestæ* (the accident), and are not made at the same time or so nearly contemporaneous with it as to characterize it or throw light upon it and which are purely narrative and give an account of the transaction wholly past, are inadmissible.

McCabe v. Dry Dock E. B. & B. R. Co., 15 Daly, 504, 8 N. Y. Supp. 336.

c. Length of time between act and declaration.

The length of time between the act and its subsequent narration by one of the actors is not material. The question is, did the proposed declaration accompany the act, or was it so connected therewith as to constitute a part of it? If so it is a part of the *res gestæ* and competent; otherwise not. *People v. Davis*, 56 N. Y. 95.

There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the *res gestæ* they cannot be admitted. And if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestæ*. *Kennedy v. Rochester City & Brighton R. R. Co.*, 130 N. Y. 654, 29 N. E. 141.

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Complaints of injury made several days after being ejected from a train are admissible. *Page v. New York Central & Hudson River R. R. Co.*, 13 N. Y. Super. Ct. (6 Duer) 523.

The plaintiff in *Uransky v. Dry Dock E. B. & B. R. Co.* (7 N. Y. S. R. 395), was injured while a passenger on the defendant's road. Evidence of statements made by plaintiff to a friend four days after the accident was admitted. But its admissibility was questioned by Judge Daniels on appeal. He held that it was no part of the *res gestæ* under the authority of *Waldele v. New York Central & Hudson River R. R. Co.*, *supra*.

In an action for assault and battery a complaint made by the injured party a few hours after the injury was received and before he had fairly recovered from the shock and while he was still suffering with pain, is competent evidence. *Baker v. Griffin*, 23 N. Y. Super. Ct. (10 Bosw.) 140.

Spatz v. Lyons (55 Barb. 476), was an action brought to recover damages for injuries inflicted on the plaintiff's wife by one defendant. Evidence was admitted of a statement made by the plaintiff's wife to the plaintiff to show who the person was that committed the assault. The court said that had the statement been made in a conversation with the deceased immediately after the occurrence it might have been admissible as part of the *res gestæ*, but as it was made in a conversation held on the day after the assault, it was inadmissible.

The plaintiff in *Kane v. City of Troy* (48 Hun, 619, 1 N. Y. Supp. 536), was injured when his sleigh was overturned by a pile of rubbish in the street. The court held that evidence that the plaintiff complained of pain when taken out in a carriage some weeks after the injury, was admissible.

In *Werely v. Persons* (28 N. Y. 344), it appeared that the plaintiff, a boy of 14 years, was kicked in his side by the defendant for whom he was working. The next day he went to work for another farmer and slept with another hired man for two months. The hired man was allowed to testify that the plaintiff in the night time complained of his right side and said that he lay on his left side because it hurt him to lie upon his right side.

d. Spontaneous exclamations.

The exception to the general rule excluding hearsay evidence may be stated as follows: Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury when uttered by the injured person immediately after the injury; provided that such exclamations be spontaneous expressive of the injured person's observation of the effects of a startling occurrence, and the utterance is made within such limit

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of time as presumably to preclude fabrication. It will be observed that this exception contemplates and permits proof of declarations by an injured person made after the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690.

The distinction between spontaneous declarations and other declarations deemed part of the *res gestæ* was clearly pointed out by Chief Judge Cullen of the Court of Appeals when he was a member of the Appellate Division in the second department in the case of *Patterson v. Hochster* (38 App. Div. 398, 56 N. Y. Supp. 467), where he said: "Declarations admitted as part of the *res gestæ* may be divided into three classes: The first is where they constitute a part of the transaction itself which is sought to be proved; the second is where they tend to qualify, explain or characterize the acts which they accompany; the third is where the declarations are made at the time of the transaction, but relate solely to the acts and conduct of others. The text books and decided cases justify the admission of all these declarations on the same ground as being part of the *res gestæ*. But it is apparent that, logically and on principle, the admission of declarations of the third class must stand on a different ground from that which supports the admission of the two other classes. If a man, being wounded, calls out, 'John has stabbed me,' the declaration in no way qualifies or explains the act of the person who stabbed him. In reality testimony to the declaration is pure hearsay, and is admissible in evidence only upon the great improbability that the spontaneous utterance of the instant should be false."

In *People v. Del Vermo* (192 N. Y. 470, 85 N. E. 690), it appears that the witness, who testified to the declarations made by deceased, was walking along the street with the deceased and the defendant when the defendant started to run and the witness asked the deceased, "What is the matter with that fellow?" The deceased responded, "Maybe he saw something about the store." As the deceased said this he walked forward four or five steps and dropped to the sidewalk. The witness then asked him, "What is the matter?" And deceased answered, "Del Vermo stabbed me with a knife." The court held that this was properly received under the exception to the general rule excluding hearsay evidence, as spontaneous exclamations.

In *Scheir v. Quirin* (77 App. Div. 624, 78 N. Y. Supp. 956, aff'd 177 N. Y. 568, 69 N. E. 1130), the plaintiff's intestate, an employee of the defendant, was scalded by falling into a vat of boiling liquid. He ran into a boiler house about seventy feet away and called out to a co-employee: "Oh, George! I am scalded. The plank slipped off and threw me in." The court in holding this declaration competent said: "This engine room

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was 60 or 70 feet from the vat, and Scheir ran there in intense pain, and spontaneously cried out as stated. This was closely connected with the transaction, and was the natural exclamation of a man in great agony and suffering, and we think it may be said to be part of the *res gestæ*. It is very difficult to enunciate any principle from the authorities on this subject which will fit every case. In order to make a declaration of this kind competent, it seems to be settled that it must bear a close relation to the principal transaction, and that it must be a spontaneous exclamation,—an outburst of the feelings, and not a mere narration of a past event."

The plaintiff in *West v. Manhattan Ry. Co.* (56 N. Y. Super. Ct. (24 J. & S.) 590, 1 N. Y. Supp. 519), was injured by having his foot caught between one of the defendant's cars and a gate thereof and by being dragged along by the train while in that position. On the trial it was shown that immediately after the accident the plaintiff said: "Take these splinters out of my leg! Take those splinters out!" The court was of the opinion that the words uttered by the plaintiff were admissible under the rule that allowed exclamations. The court said: "A strict grammatical standard should not be used. The jury might find the words were exclamatory in reality. There were as a matter of fact no splinters in his leg. The words were not received as evidence of there being splinters. The jury might find that pain forced out the words."

If the exclamations are the impulsive or instinctive outcome of the act, they need not be strictly contemporaneous in order to render them admissible. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690.

c. Statements as to cause of injury.

1. Voluntary.

The plaintiff, in *Barrett v. New York Central & Hudson River R. R. Co.* (157 N. Y. 663, 52 N. E. 659), received the injuries for which he sought to recover damages when he was ejected from one of the defendant's trains upon which he had stolen a ride. On the trial, the defendant called a witness who had a conversation with the plaintiff a short time after the accident in which the plaintiff stated to him some of the facts and circumstances under which the accident occurred. The defendant's counsel sought to prove by this witness the plaintiff's own version of the transaction which he claimed resulted in the injury and, as Judge O'Brien said this was at a time immediately after the accident before the suit was commenced and perhaps when there were not as many temptations to pervert the truth. The trial court excluded the evidence. The Court of Appeals held that this was error.

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In *Downs v. New York Central R. R. Co.* (47 N. Y. 83), the plaintiff, a boy of twelve was injured in attempting to leave one of the defendant's cars. The man who took the plaintiff from under the cars after testifying that he had his hands on the plaintiff from that time until the amputation, was asked: "Did he state on that occasion that the way the accident happened was, that he was standing on the threshold of the car and that the cars were jerked up and threw him under the train and that they ran over him, or in substance that?" To which the answer was: "That was the substance of his reply." The court held the admission of this evidence to be error.

It appeared from the plaintiff's own testimony in *Moorhead v. Eckert* (61 Misc. 612, 114 N. Y. Supp. 31), that she was fully conscious after she fell and in no condition of distress such as would take from her utterances the quality of deliberation. Hence, the court said, any statement by her bearing upon the cause of the accident would have been but a narration of past events, a self-serving declaration, and not of the character of proof admissible as part of the *res gestæ*.

In *Scheir v. Quirin* (77 App. Div. 624, 78 N. Y. Supp. 956, aff'd 177 N. Y. 568, 69 N. E. 1130), the plaintiff's intestate, an employee of the defendant, was scalded by falling into a vat of boiling liquor. He ran into a boiler house about seventy feet away and called out to a co-employee: "Oh, George! I am scalded. The plank slipped off and threw me in." The court held the declaration competent.

2. In response to inquiry.

The plaintiff's intestate, in *Lahey v. William Ottman & Co.* (72 Hun, 61, 25 N. Y. Supp. 897), was run over by the defendant's cart. Immediately after the accident, decedent was taken to a drug store, one or two blocks from the place of the accident. A policeman who was attracted by the crowd asked the plaintiff's intestate at the drug store how the accident occurred. The policeman testified that "the deceased said that he was about to take a Third Avenue car. He left the sidewalk and this wagon came along. He was about to board the car, and this wagon came along, and he held his hand up to pull them up, and before he had a chance to get out of the way he was thrown down." The court in holding the declarations inadmissible, said: "Whether self-serving declarations are admissible or not depends upon whether they were made under such circumstances that they are presumed to be instinctive, but if they may have been the result of thought or deliberation they are not admissible. The declarations at the drug store are clearly not a part of the *res gestæ*. The accident occurred at the corner of Thirty-Second street, and the drug store was either one or two blocks away, and some time had intervened between

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

the accident and the interview,—how much is not disclosed by the record. The declarations were not voluntary, but were drawn from the declarant by the question of the policeman."

In *Martin v. New York, N. H. & H. R. R. Co.* (103 N. Y. 626, 9 N. E. 505), the plaintiff's intestate was an employee of the defendant railroad company. He was injured while attempting to cut off a car. After the deceased had been taken out from under the car by which he had been injured and while he was being conveyed to the switch house by his fellow employees, some one asked him how the accident had happened and he said: "I pulled the pin and made a grab for the car and there was nothing there for me to grab." The court following the decision in the *Waldele* case, *supra*, held that the evidence was incompetent.

In *People v. Del Vermo* (192 N. Y. 470, 85 N. E. 690), it appears that the witness, who testified to the declarations made by deceased, was walking along the street with the deceased and the defendant when the defendant started to run and the witness asked the deceased: "What is the matter with that fellow?" The deceased responded: "Maybe he saw something about the store." As the deceased said this he walked forward four or five steps and dropped to the sidewalk. The witness then asked him: "What is the matter?" And deceased answered: "Del Vermo stabbed me with a knife." The court held that this was properly received under the exception to the general rule excluding hearsay evidence, as spontaneous exclamations.

The plaintiff's intestate in *Waldele v. New York Central & Hudson River R. R. Co.* (95 N. Y. 274, 47 Am. Rep. 41), was an educated deaf mute. He was killed by one of the defendant's engines. Shortly after the passage of a train and an engine, groans of the intestate were heard, and he was found lying upon the outer track of the railroad about fifteen feet from the sidewalk badly bruised and mangled. He was soon removed to the sidewalk and afterwards to the hospital where he died in about three hours. After he was removed to the sidewalk, his brother, also a deaf mute, was sent for and about thirty minutes after the accident he there obtained from him, by signs, the following declaration. The brother testified: "John said he got hit! John said there was a long train, that he stood waiting for it to go, and an engine followed and struck him." The court held the evidence incompetent.

f. Statements as to condition.

In *Matteson v. New York Central R. R. Co.* (35 N. Y. 487, 14 Am. Rep. 67), the plaintiff's wife was injured while riding in one of the defendant's cars. After the accident she was taken to Utica, her home town, up-

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

on the train and was carried in a wagon a short distance up the street where she took the stage the same afternoon and was carried to a neighbor's house to wait for a conveyance from home. The court held that declarations as to her health and condition made by the plaintiff's wife to her neighbor at that time were admissible.

The plaintiff in *Caldwell v. Murphy* (11 N. Y. 416), was injured by the overturning of the defendant's stage. In answer to a question as to the condition of the plaintiff's health since the accident a witness answered "he has invariably complained." The court, in holding the evidence competent, said: "I am of opinion that the evidence objected to did not fall within the rule which excludes the declarations of a party in his own favor. It is one of the natural concomitants of illness and of physical injuries, for the sick or injured person to complain of pain and distress. A complaint, it is true, may be simulated, but it is generally real. I think such evidence is admissible from the necessity of the case, and that it may safely be left to the jury in connection with the other evidence touching the alleged sick or injured person's condition."

The plaintiff in *De Long v. Delaware, Lackawanna & Western R. R. Co.* (37 Hun, 282), was injured when a berth in one of the defendant's cars fell. The court held that evidence of the plaintiff's declarations in respect to her condition during twelve days intervening between the time of her injuries and the time she took to her bed was admissible.

In *Powers v. Village of West Troy* (25 Hun, 561), the plaintiff was injured when his cutter overturned by reason of a defect in the street. On the trial a witness swore that immediately after the accident and just as they got back into the cutter, the plaintiff said that he was badly hurt. As to the admissibility of this evidence the court said: "We think the evidence was properly admitted. It was in no sense a narrative of a past transaction but was a statement of the present condition of the plaintiff made at a time when it was fairly to be inferred that such condition was the effect of the overturn, and without opportunity for reflection or concoction."

In *Patterson v. Hochster* (38 App. Div. 398, 56 N. Y. Supp. 467), which was an action brought to recover damages for the death of the plaintiff's intestate resulting from an injury which is alleged to have been caused by her falling into a coal hole in the sidewalk in front of the defendant's premises, the witness who left the house with the deceased at about dusk accompanied her to the sidewalk. The witness testified that she turned around with her back from the deceased, and that the deceased screamed, "My God!" The witness rushed out and put her hands under her neck. The deceased then said: "Never mind my head, my leg is in the scuttle

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

hole and it is broke." It all happened in less than two or three minutes. The court, in holding the declaration of the deceased admissible in evidence said: "It was descriptive of her condition and situation at the very time she made the statement, and therefore contemporaneous."

g. Declarations indicating suffering.

A story by a plaintiff on the witness-stand of the pain he has suffered may be suspected as a prepared statement by an interested party to sustain his case; but of a different character, and of a far greater probative force, are the involuntary cries of nature wrung from the sufferer by the poignancy of present anguish. (Smith v. Dittman, 16 Daly, 427, 11 N. Y. Supp. 769.) In that case the plaintiff was injured by the falling of a bale of cloth. A witness was asked what exclamation of pain the plaintiff made on her return to her home immediately after the injury. The offered testimony was excluded and the court held that this was error.

Evidence of exclamations which are natural concomitants and manifestations of pain and suffering are admissible because regarded as involuntary and natural expressions which a witness may describe for the same reason that he may the appearance of the party. (Hagenlocher v. Coney Island & B. R. R. Co., 99 N. Y. 136.) In that case in response to a question as to how the plaintiff manifested that she was suffering pain, a witness answered that she screamed. The court in holding the evidence admissible said: "Screaming or some similar exclamation is the natural language of pain in all men and in all animals as well. It usually and almost invariably accompanies intense pain; and hence such exclamations have always been received as competent evidence tending to show suffering.

Judge Haight, in *Olp v. Gardner* (48 Hun, 169), stated the rule as follows: "Evidence of declarations, which are of an involuntary nature indicating pain or suffering, such as sudden or involuntary groans, screams or sighs, resulting from a touch, movement or contact with a foreign substance, is competent; but the evidence of statements made long after the injury, as to the effect of the injury, or as to the suffering endured therefrom, is not competent."

In *Lewke v. Dry Dock East Broadway & Battery R. R. Co.* (46 Hun, 283), it appeared that the plaintiff was picked up from the spot where he was injured and carried into a witness's store. The witness noticed the condition of his clothes and that his left leg seemed to be swelling. The witness testified that the plaintiff complained of pain in the limb. The court in its opinion said: "It is competent to prove exclamations of the injured party indicating that he is suffering pain in the part said to have

Admissibility of declarations of injured person immediately after receiving injury.—Continued.

been injured, not only at the time of the accident but even afterwards, and it would seem that the complaint in the present case, made so soon after the accident and while the plaintiff's injured leg was visibly swelling, was so closely allied to mere exclamation as to justify the reception of evidence.

In *Kennedy v. Rochester City & Brighton R. R. Co.* (130 N. Y. 654, 29 N. E. 141), the plaintiff was injured as the result of a fall from the platform of one of the defendant's street cars. In holding that complaints made by the plaintiff after she reached home were inadmissible, the court said: Now, in this case, between the time of the accident and the declarations of pain, plaintiff had walked in a direction opposite to her home to the street-car barns and listened to the conversation which her sister had with the superintendent; then she walked up State street several blocks along which cars were passing every few minutes to "the four corners," where she took a car to Hubbell Park, and then walked two blocks home. Certainly it cannot be asserted that this conversation was an incident of the injury in the sense that it emanated immediately from it, or that it stood in any immediate causal relation to the act of falling and its first effect, or that it was not so far separated from the occurrence as to admit of the formation of a plan to strengthen plaintiff's case against the defendant."

The plaintiff in *Kane v. City of Troy* (48 Hun, 619, 1 N. Y. Supp. 536), was injured when his sleigh was overturned by a pile of rubbish in the street. The court held that evidence that the plaintiff complained of pain when taken out in a carriage some weeks after the injury, was admissible.

In *Werely v. Persons* (28 N. Y. 344), it appeared that the plaintiff, a boy of 14 years, was kicked in his side by the defendant for whom he was working. The next day he went to work for another farmer and slept with another hired man for 2 months. The hired man was allowed to testify that the plaintiff in the night time complained of his right side and said that he lay on his left side because it hurt him to lie upon his right side.

The plaintiff, in *West v. Manhattan Ry. Co.* (56 N. Y. Super. Ct. (24 J. & S.) 590, 1 N. Y. Supp. 519), was injured by having his foot caught between one of the defendant's cars and a gate thereof and by being dragged along by the train while in that position. On the trial it was shown that immediately after the accident the plaintiff said: "Take these splinters out of my leg! Take those splinters out!" The court in holding the words uttered by the plaintiff admissible said: "The jury might find the words were exclamatory in reality. There were as a matter of fact no splinters in his leg. The words were not received as evidence of there being splinters. The jury might find that pain forced out the words."

(Court of Appeals, December, 1913.)

MATTER OF OSBORNE.

(209 N. Y. 450, 103 N. E. 723. *Mod'g and Aff'g* 153 App. Div. 312, 138 N. Y. Supp. 18.)

1. Life estates — Stock held in trust — Dividend upon — Who entitled to — Intent of maker.

In determining who is entitled to a dividend upon stock held in trust, the intention of the testator or the maker of the trust must be carried out when such intent is clear, so far as such intent does not result in an unlawful accumulation of income.

Note. *Right to dividends on stock held in trust as between life tenant and remainderman.*

- a. *In general*, 134.
- b. *When declared prior to death of testator but payable in future*, 135.
- c. *When derived from earnings*, 136.
 - 1. *Cash dividends*, 136.
 - 2. *Stock dividends*, 140.
 - 3. *When dividend consists of stock in other companies*, 149.
- d. *When derived from sale of assets*, 152.
- e. *Effect of Code of Civil Procedure*, 157.

a. In general.

In *Thayer v. Burr* (201 N. Y. 155, 94 N. E. 604), stock of the Adams Express Company was the subject of the trust. During the life of the trust the company distributed among its stockholders bonds at the rate of \$100 per share on one occasion and \$200 per share on another. The court held that so far as the bonds represented the actual earnings of the corporation they belonged to the life tenant, but as the second issue represented to some extent an increase in the value of the investments of the company, that is the increased or enhanced market value of the securities held by the company, that part belonged to the remainderman.

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Matter of Osborne.**2. Life Estates — Supervision of Court of Equity.**

The integrity of a trust fund and the rights of the life beneficiary under the trust should each be considered, determined, and preserved by a court of equity.

3. Life Estates — Ordinary stock dividends — Who entitled to.

Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust.

4. Life Estates — Extraordinary stock dividends — Who entitled to.

Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

b. When declared prior to death of testator but payable in future.

In *Matter of Kernochan* (104 N. Y. 618, 11 N. E. 149), the rights of the parties depended upon the true construction of the provision of the will which empowered the executors "to receive the rents, interest and income" of so much of the estate as was given to them in trust. The trust fund included 5,000 shares of railroad stock. A dividend was declared upon this stock prior to testator's death payable at a certain date which was after his death. The court in holding that the life tenant was not entitled to the dividend said: "As soon as the profits on shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once becomes a part of his estate. The fact that they are made payable at a future time is immaterial. One dividend to which the life tenant may be entitled as income, can only be that which the company declares after that relation is acquired. In this case the dividend represented profits, or income, but had become a debt before the will took effect."

By a clause in the will construed in *Cogswell v. Cogswell* (2 Edw. Ch. 231), the testator permitted his wife "to take the interest or dividends on £3,000 British Government 3% stock during her natural life." The court held that the widow was entitled to any dividends which might accrue or be declared or become payable at any time after the death of the testator.

Appeal from a judgment of the Appellate Division, Second Department.

Proceedings for the judicial settlement of the account of James W. Osborne, as executor and trustee under the will of Eugene La Grove.

Gilbert D. Lamb, of New York City for executor-appellant.

Louis Marshall, of New York City, for respondent.

CHASE, J. Eugene La Grove died a resident of this state October 4, 1908, leaving a will which was duly probated and by the fourth paragraph of which a trust was created as follows:

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

In the Kernochan case (*supra*), Judge Danforth in referring to the Cogswell case (*supra*), said: In that case "the testator directed that his wife be permitted 'to take the interest or dividends' on certain stock and the question submitted was 'as to the time from which she would be entitled to dividends,' and the vice-chancellor said from the death of the testator, that is to say," he adds, "the dividends which may accrue, or be declared, or become payable at any time after" that event. The terms of the will and the question were unlike those before us. The will in one case gives income or profits, in the other dividends, that is the share of income or profits already ascertained and declared. The first gives that to which the testator had no legal title. The other might include that of which he became the legal owner on the day when the dividend was declared, although it remained unpaid."

a. When derived from earnings.

1. Cash dividends.

Matter of Kernochan (104 N. Y. 618, 11 N. E. 149), had to do with a cash dividend of \$24.26 per share. This dividend was declared after the death of the testator who left his stock in trust. The court held that the whole of the dividend belonged to the income, although it represented a surplus, the greater part of which was earned before the testator's death.

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"All the rest, residue and remainder of my property and estate, real, personal and mixed of every description and wheresoever situated of which I may die seized or possessed * * * I give, devise, and bequeath to my executor and trustee herein-after named in trust, to hold said property and estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom, and to pay the net rents, issues, income and profits therefrom quarterly to my wife, Ivy Lee La Grove from the time of my death during the term of her natural life, and, upon her death, to divide the principal into as many shares as my wife shall leave children by our marriage her surviving * * * but in the event that my said wife shall die leaving no issue her surviving, then at her death the principal so set apart for her benefit shall be paid to such person or persons as would

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

In that case the court said: "The referee made the apportionment in question by ascertaining how much was earned before and how much after the death of the testator, and so doing applied a rule which may be founded on general equity, viz.: that when a fund is given for life to one beneficiary, and remainder over, the first shall have its earnings after the life tenancy begins, and the remainderman the balance. I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule, which gives cash dividends declared from accumulated earnings or profits to the life tenant, should be applied. The direction to his executors is to receive the rents, interest and income of his estate, and apply the net amount of such rents or other income to the use of his wife. From the shares in question no income could accrue, no profits arise to the holder until ascertained and declared by the company and allotted to the shareholder and that act should be deemed to have been in the mind of the testator, and not the earnings or profits ascertained by a third person, or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise. * * * Payments in respect of profits accruing and properly divisible as such, are income and belong to the tenant for life, if the sum payable is ascertained and declared after testator's death."

The trust clause of the will in *Robertson v. De Brulatour* (188 N. Y. 301, 80 N. E. 938), gave certain shares of stock, "also every and all divi-

be entitled to share in her estate were she to die intestate under the statute of distribution in force at the time of her death in the state of New York." The testator did not leave any descendants. Ivy Lee La Grove, who was his wife, is living. The rest, residue, and remainder of the property, as provided by the fourth paragraph of the will, is held in trust by James W. Osborne as trustee pursuant to the provisions of such paragraph.

The will also provides in the fifth paragraph thereof as follows: "I hereby request my executor and trustee under this my will not to sell any stocks that I may hold at the time of my death in the Singer Manufacturing Company, unless the remainder of my property and estate is insufficient to pay my just debts and funeral expenses and the specific legacies and

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

dends which may be declared on the above described stock subsequent to my death, in trust, nevertheless, to receive the income and profits thereof and apply the same to the use of my said wife during the term of her natural life." The testator then gives the remainder to such persons as would have inherited the same if the same were real estate and he had died intestate and unmarried. A cash surplus was distributed among the stockholders of the New York & H. Railroad Co. at the rate of \$12.50 per share. The testamentary trust included stock of said company. The court held that as such cash surplus was one long accumulating from earnings, profits and income, which had been a part of the general assets, but always the representative of income and not of capital, the distribution in question was comprehended within the testator's gift to his beneficiary (the life tenant) of the "income and profits" of the trust properties.

Bank stock was the subject of the trust in *Matter of Warren's Estate* (11 N. Y. Supp. 787, 2 Con. Sur. 411, 33 N. Y. S. R. 584). Subsequent to testator's death the Bank passed a resolution reducing its capital stock by returning one-half of the capital to the stockholders with a premium of 40 per cent. payable out of the surplus and profits. It also passed a separate resolution declaring a dividend of 40 per cent. on the one-half of the capital stock returned. The clause of the will in question was as follows: "I also give and bequeath to my said wife the use, interest, and income, during the term of her natural life, of all the rest and residue of my per-

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charges in this my will contained; and in case such remainder of my estate is insufficient to pay such debts and funeral expenses and the specific legacies in this my will contained, then and in that event I request my executor to sell only so much of the stock of said company as is necessary to be sold in order to pay such debts, legacies and charges. I authorize, however, my executor and trustee created under this my will that should he so elect, he may sell said stock or any of the same and in his discretion change the investment of said trust funds and should my executor and trustee elect to sell said stock or any part thereof, that he shall at all times keep the proceeds thereof as well as any other part of the trust funds herein devised or bequeathed invested in stocks and bonds of the United States or of the state of New York and such stocks and bonds or other

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

sonal property and estate," with the remainder over as to the principal. The court in holding that the life tenant was entitled to the 40 per cent. said: "I think it may properly be inferred that the testator supposed that after his death the bank stock would form part of his estate, and it is also properly assumed that he knew when he provided that his widow should receive the income from his estate she would not have any right in or to the earnings of the bank until a dividend was declared, though the bank might earn thousands, and might defer dividing for years; but that whenever a dividend was declared, such dividend became at once income to the estate, whether it was paid from earnings made by the bank since the death of the testator or before that time (Citing *Hyatt v. Allen*, 56 N. Y. 533, 15 Am. Rep. 449; *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149). I therefore conclude that the true construction of this clause in the will gives to the widow as income of the estate any dividend of earnings properly declared by the bank upon stock belonging to the estate. This payment of 40 per cent. on that part of the capital of the bank which was retired was however an unusual and extraordinary dividend, and there may be doubt whether it is to be considered as a dividend of earnings to the shareholders, or whether it should not be considered a payment back to the shareholders of capital. The bank in one resolution proposes "to return" to the stockholders \$400,000, "with a premium of 40 per cent., payable out of the surplus and profits," and again it is resolved "that a dividend of 40 per cent." on the capital to be returned "be declared and

investments as may be at the time legal investments for trust funds in the state of New York."

The principal part of the estate of the testator consisted of 3,000 shares of the stock of the Singer Manufacturing Company, a corporation organized and existing under the laws of the state of New Jersey. The capital stock of the Singer Manufacturing Company at the time of the death of the testator was \$30,000,000. On that day it had a surplus of accumulated earnings arising exclusively from the business of the company amounting to \$37,604,206. On June 17, 1910, such surplus had increased to \$51,560,757. On March 31, 1910, the executor sold 80 shares of the stock of said company. On June 2, 1910, the board of directors of said company passed a resolution as follows: "Whereas this corporation now has a capital stock of thirty millions of dollars issued and outstanding and a sur-

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

payable to the shareholders." The bank by its action could have capitalized its surplus earnings, or it could have divided its earnings among the stockholders in the form of dividends. It had the power to do either, and whether its action was one or the other determines whether the \$1,000 was part of the capital or income from the capital. Until the proceedings were taken by the bank, the surplus earnings belonged only to the bank. By its proceedings, the shareholders acquired a right to so much of the surplus as the bank determined to part with. Did the bank give up this part of the surplus as capital or as earnings? I conclude that it was as earnings. It was determined by the bank to return to the shareholders a portion of the capital they had in the bank, with a "premium" or "dividend," or whatever you may choose to call it, but whatever it was, it was payable from the "surplus and profits," and the amount was directed to be taken from the "account of surplus funds." It was recorded in the books of the bank as a dividend and paid out as such. I am of the opinion that the widow is entitled to this sum of \$1,000 as income derived from the bank stock."

2. Stock dividends.

Where a corporation has declared a dividend upon its capital stock, payable in new stock certificates, if it is based upon an accumulation of

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plus of thirty millions of dollars and upwards, and, whereas, it is desirable that said surplus to the extent of at least thirty million of dollars should be retained by the corporation as working capital, and to that end that its capital stock should be increased to sixty millions of dollars and a stock dividend of thirty millions of dollars be declared out of such increase, therefore, be it resolved: First, That it is advisable to increase the capital stock of this corporation to sixty millions of dollars, and Second. That it is advisable to declare and pay to the stockholders of the corporation a stock dividend of thirty millions of dollars out of such increase of stock. And the board does hereby call a special meeting of the stockholders to be held at the company's office at the Singer Building in the city of Elizabeth on the sixteenth day of June, 1910, at three o'clock in the after-

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

earnings, or profits, by their distribution in that manner, the stockholders receive the representative of income and not of capital.

In *McLouth v. Hunt* (154 N. Y. 179, 48 N. E. 548, 39 L.R.A. 230), the testatrix by a residuary clause, created a trust, included in which was 254 shares of Western Union Telegraph Co. stock. This company, by a capitalization of accumulated earnings made and retained in its hands, from time to time, increased its capital stock from \$86,200,000 to \$100,000,000, and predicated thereon made a stock dividend of ten per cent. to its stockholders. The court in holding that this stock dividend went to the life tenant instead of the remainderman, said: "The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman. When questions arise under a will between parties standing in such relations to each other, with respect to the right to accumulated earnings upon capital stock, the courts must determine the questions for themselves, according to the nature and substance of the thing which the corporation has assumed to transfer from the one to the other, and they are not concluded by mere names or forms. For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter, but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted the action of the corporation will not conclude the courts."

noon, to take action upon the above resolution and decide whether or not such increase of stock shall be made."

On said 16th day of June, 1910, the stockholders adopted a resolution as follows: "Resolved, that the directors be and they hereby are authorized and empowered to forthwith declare a stock dividend of thirty millions of dollars, or one hundred per cent. on the present issued capital stock of this company, and to issue forthwith in payment thereof certificates of fully paid nonassessable stock, to the stockholders of record at this date, in the amounts in which they are respectively entitled to the same."

On June 17, 1910, the board of directors of said company adopted a further resolution as follows: "Resolved that the directors declare and they do now declare a stock dividend of thirty millions of dollars, or one hundred per cent. on the pres-

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

Lowry v. Farmers' Loan & Trust Co. (172 N. Y. 137, 64 N. E. 796), was an action brought to determine whether the life tenant or the remaindermen were entitled to a stock dividend of fifty per cent. declared upon the capital stock of the Pullman Palace Car Co., part of which stock was included in the trust estate. The court in holding that the life tenant was entitled to the dividends said: "In approaching the consideration of such a question, the language in which the gift is made to the beneficiary of a trust, or the life tenant of the estate, must be regarded, in order to determine, preliminarily, the comprehensiveness of the testator's intention, with respect to the enjoyment by the object of his bounty of the yield of the intermediate estate. Then the transaction, through which the property of the corporation in being distributed in the extraordinary form of a stock dividend, is to be looked into; in order that its true nature may appear and that a determination may be reached, whether capital, or an accumulation of profits on capital, is being divided among the stockholders. While the corporate action may not be, necessarily, conclusive upon the court; with respect to the question, if it is based upon the facts, and is not purely arbitrary, it will, and should, be controlling. In the first place, then, we have, in this will, a provision made by a parent for his child; which gives to the latter the "rents, issues and profits" of his equal share of the residuary estate, during his life. Upon the remarriage, or the death, of the testator's widow, that share is to be proportionately

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ent issued capital stock of this company payable forthwith to the stockholders of record on the 16th day of June instant out of said increase of stock, and that the president and treasurer be and they hereby are authorized and directed to issue forthwith to the several stockholders of record on the said 16th day of June instant, certificates for so many shares of fully paid and nonassessable stock as said shareholders shall severally be entitled to in payment of said dividends." Thereupon, and on the same day, June 17, 1910, said company paid over and delivered to James W. Osborne as such executor a stock dividend of 2,920 shares of the par value of \$100 each, being one share of increased capital stock of said company for each share of old stock theretofore held by said Osborne as executor, and said stock remains in the possession of said Osborne as such executor and trustee.

Right to dividends on stock held in trust as between life tenant and remainderman.—Continued.

increased by the distribution of the one-fourth share, which had been held in trust for the widow. Further, the testator directed that the entire income of the securities of the trust fund was to be applied and that no part should be diverted to the formation of a sinking fund to replace any loss of the principal by depreciation in value of the securities. These provisions, certainly evidence a comprehensive intention of the testator that whatever was in the nature of profits upon, or income of, the trust fund should be fully enjoyed by the beneficiary. In the next place, we have the trustee receiving from the Pullman Company, upon the shares of its stock held in trust, a dividend of fifty per cent., paid out of "accumulated net surplus at the credit of income account," in certificates of new stock of the corporation. The fact of the source of the dividend appeared from the company's statement; which showed an accumulation of net surplus from year to year, for thirty-one years. A cash dividend of twenty per cent. had been declared a short while previously; which the trustee had paid over to the plaintiff. Had this dividend of fifty per cent. been declared and paid in cash, would there have been much doubt about the plaintiff's right to receive it? What reasonable, or substantial, distinction is there, in principle of ownership, between a dividend which is paid in stock and one which is paid in money, when either is based upon a division of earnings? * * * It is true enough, as the appellant argues, that the testator, at the time of his death, owned the right to share in

After the death of La Grove, and prior to the payment to Osborne as such executor of the stock dividend, regular cash dividends had been paid on said stock amounting in the aggregate to \$242,564.18, which has been paid from time to time by said executor to said Ivy Lee La Grove, the beneficiary under the trust, as provided by said will.

The troublesome question as to who is entitled to extraordinary dividends declared upon stock held in trust as between life beneficiaries under the trust and the remaindermen is again presented to us for our consideration.

The question has been considered by the courts in this and other states and countries in many and various forms from time to time since the decisions and opinions of the courts have been published. It has been said that no question before the courts has been more troublesome. Certainly none has resulted

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the assets of the corporation, proportionately to the amount of stock which he held; but it does not, therefore, follow that dividends, thereafter made from the accumulations of earnings, must be regarded and treated as additions to the capital of the trust estate. All stockholders are interested in the operation of the property of a corporation, and their shares of stock represent individual interests in the corporate enterprise, in its capital, as in its net earnings; but the corporation itself has the legal title to all the properties, and holds them for their benefit. They have a right to dividends, only as the corporate agents, in the exercise of their discretion, may declare them * * *, and they have the right to a *pro rata* distribution of the corporate assets upon dissolution."

In *Simpson v. Moore* (30 Barb. 637), the testator directed his executors to retain and invest one-sixth part of his estate and to pay over the income thereof to his wife during her life, and to his children and their representatives on her death. A portion of the trust fund was in the capital stock of the National Bank and of the Merchants' Bank. During the life of the widow the charter of these banks expired, and the banks reorganized. Preparatory thereto they made and declared dividends over and above the estimated par value of the stock of 18 and 26 per cent. respectively and left it to the option of its stockholders to take its stock under its new incorporation, or to take the same in money. The trustee

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in greater contrariety of views. Decisions that are apparently contradictory either in the same court or in the courts of different states and countries have, however been caused in part by different facts and circumstances existing in the cases decided, and the effect necessarily given to the language of the will or instrument creating the trust in the particular cases in which the decisions have been rendered.

In determining who is entitled to a dividend upon stock held in trust, the intention of the testator or the maker of the trust must be carried out when such intent is clear, so far as such intent does not result in an unlawful accumulation of income. Very many cases arise, however, where the testator or maker of the trust had not considered the possibility of enormous dividends being declared by corporations to effectuate their reorganization or in the division of accumulated profits, made

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elected to receive the dividends in new stock. The court was of the opinion that the testator intended all the income of the property which he ordered to be invested should be paid to the wife, but that the capital so invested should be preserved. To quote: "The payments in question must be considered as dividends; but as they contained part of what was held as capital when the stock was purchased, so much thereof as was necessary to make up the original investment, over and above the par value of the stock taken by the trustee in exchange, should be retained by him, and the residue belongs to the plaintiff (the widow.)"

In *Goldsmith v. Swift* (25 Hun, 201), there were two issues of stock as a result of a consolidation of two corporations. The first issue was simply an accretion to the original stock which was made in the process of consolidating the two corporations, for the purpose of equalizing the value of the interests of the stockholders therein respectively; and the court held that they represented capital, and not earnings or profits, or anything which could be the subject of a dividend, and were therefore not distributable to the life tenant. The second issue was in payment or in lieu of antecedent certificates, and these represented the earnings of one of the old corporations, which had accrued before the certificates were issued. These the court held should be treated by the trustee as a dividend and payable to the life tenant.

necessary by new statutes, changed circumstances, and modern rules and conditions, or, if such testator or maker of the trust had considered such possibility, he failed to express himself in the instrument creating the trust so as to show any clear intention regarding the same.

In England, as far back as 1799, it was established as a rule that all extraordinary or unusual dividends declared during the continuation of a life estate, whether payable in cash or in stock, belong to the corpus of the fund and not to the income. *Brander v. Brander*, 4 Ves. Jr. 800. The decision in the case cited was repeatedly followed and the rule restated. The rule in England as stated in the earlier cases has been materially modified, and dividends of cash are now held to belong to the life tenant and stock dividends to the remainderman, subject, perhaps, to

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In *Chester v. Buffalo Car Mfg. Co.* (70 App. Div. 443, 75 N. Y. Supp. 428), it appeared that there was left in trust 60 shares of stock. After testator's death and during the life of the life-tenant the corporation increased its capital stock so that instead of 60 shares the estate represented 360 shares. This stock was issued against an accumulated surplus. The court in holding that the increase belonged to the remaindermen as an increase of the capital and not as dividend or income said: "While it is subject to modification and variation, the natural and fundamental idea of life income payable under a will is of that current income which accrues and becomes payable from time to time during the life tenancy, upon a principal fixed as of the time when the trust took effect and remaining substantially unchanged. Sometimes the amount of this principal is fixed by directions for the investment of a definite sum, and at other times by the appropriation of specified securities, as bonds or stocks. In the case of the latter, while it may happen that by means of an extraordinary dividend there will be allotted to the life tenant a certain per cent. of profits which accrue before his estate commenced, that is the unusual course, rather than otherwise. We certainly do not expect or readily accept such a solution between the life tenant and remaindermen, through the medium of dividends, as will divide a testator's estate as it existed at his death between the former and the latter in the proportion of three or four shares to the former for one to the latter. It is, however, insisted, that, unacceptable as such result may be in this case, this

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an examination of the facts and circumstances in each case in applying the rule as stated. *Bouche v. Sproule*, L. R. (12 App. Cas.) 385.

In Massachusetts, in *Minot v. Payne*, reported in 99 Mass. 108, 96 Am. Dec. 705, it is said: "A simple rule is to regard cash dividends, however large, as income; and stock dividends, however made, as capital." The courts of that state have followed such rule, taking unto themselves, however, the right to determine whether a stock dividend is in effect a distribution of cash to be treated the same as a cash dividend.

In Pennsylvania it was held in *Earp's Appeal*, reported in 28 Pa. 368, that ordinary dividends on stock held in trust belong to the person entitled to the income of the trust fund, but that extraordinary dividends should be apportioned between the

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court is compelled by controlling decisions to adopt and affirm it. We do not think this is so. This question, whether additional capital stock issued by a corporation against accumulated earnings and profits shall belong to the life tenant or remainderman, has naturally been a prolific source of dispute and controversy. In trying to deal fairly and equitably with it, the courts have been led by different theories, and varying phases under which the issue was presented, into irreconcilably conflicting opinions. Turning to those decisions which are controlling, or at least authoritative, there seem to be reasonably well defined two rules which we may utilize in measuring the rights of the parties here: First. A corporation with a surplus of accumulated profits, within the limits of good faith, has the power either to distribute it as dividends, or to retain it and convert it into capital. Second. The substance and intent of the action of the company, as evidence by its treatment of the surplus and its resolutions in issuing new stock against it, will be considered by, if not controlled, the courts, in deciding whether such issue is dividend, and hence income belonging to the life tenant, or not. If the company pays money or issues stock as a distribution of profits, it will ordinarily go to the life tenant. If it issues stock as capital, and appropriates its surplus as an increase of the capital stock of the concern, such issue will be held to inure to the benefit of the remainderman. There is the other general rule always, applicable to construction under a will,—that we must ascertain, if possible, the meaning and intention of the testator, to be derived

life estate man and the remainderman in accordance with the amount thereof accumulated before and after the creation of the trust.

The question has been considered by the courts of nearly every state in the Union and by the federal courts. It would be quite impossible to reconcile the many reported decisions. An effort to determine the weight of authority would be difficult, and extend this opinion to unjustifiable length. It is not our purpose, therefore, to analyze or attempt to state the decisions of other jurisdictions or to refer to them except as we have herein to illustrate the extent of the conflict regarding the question now considered.

In this state the question was considered in *Clarkson v. Clarkson*, 18 Barb. 646 (1855). In that case one Clarkson died in September, 1845, leaving a will by which he left parts of his estate in trust for two of his children respectively. The trustees

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from the language employed in the creation of the trust, from the relations of the parties to each other, their condition, and all the surrounding facts and circumstances."

The trustee in *Matter of Robert's Will* (40 Misc. 512, 82 N. Y. Supp. 805), sold certain shares of stock which had been issued as dividend shares representing earnings of the corporation. The court held that the money derived from the sale represented income and profits, and therefore belonged to the life tenant.

In *Matter of Fish* (45 Misc. 298, 92 N. Y. Supp. 394), stock dividends and also interest-bearing bonds were issued and paid to the trustee. The court held that as these represented accumulated earnings they belonged to the life tenant.

In *Matter of Harteau's Will* (53 Misc. 201, 104 N. Y. Supp. 586), the capital stock of the corporation was doubled and therefore the trustee had twice as many shares as were left in the trust estate. The stock was increased by paying the stockholders a 100% dividend in cash out of the surplus and undivided profits; and the various stockholders thereupon with such money, purchased the new stock. The court held that this increase was income and went to the life tenant.

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were directed to invest the same and pay the "interest, dividends and proceeds arising from the two said respective shares and portions from time to time, as they shall be received, to my said daughters * * * for and during the term of their natural lives respectively; and upon the decease of either of said daughters, * * * to assign, transfer and pay over the share" as therein provided.

In January, 1846, the trustees invested \$12,600 in the capital stock of the Utica & Schenectady Railroad Company by purchasing 100 shares thereof at the price of \$126 per share, and in February, 1853, the further sum of \$6,000 in the capital stock of the Mohawk Valley Railroad Company by purchasing 60 shares of its stock of \$100 each at par. The shares of the Utica & Schenectady Company thereafter paid an annual dividend of 10 per cent. upon their par value, which annual dividend was paid from time to time by the trustees to the cestui

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3. When dividend consists of stock in other companies.

Of the property devised to the trustees in *Matter of Rogers* (161 N. Y. 108, 55 N. E. 393), were shares of the capital stock of the Rogers Locomotive and Machine Works. This corporation was capitalized at \$300,000. During the life of the trust the corporation sold its plant, raw material, and material in process of manufacture for the sum of \$2,750,000 to be paid in the stock of a new corporation whose capital was \$3,000,000; the stock of the new company was divided among the stockholders of the old company in the proportion of ten shares of the new stock to one of the old; after the sale the old company ceased to do business and went into liquidation having still in its hands assets to the value of \$3,000,000, which the officers of the corporation converted into money and distributed among the stockholders, the first division being \$100 a share. It was held that all the stock of the new company and the first dividend declared after the sale of 100 per cent. should be retained by the trustee as capital, and that all of the other property of the corporation was profits, to which the life tenants were entitled. The court, in the Appellate Division (22 App. Div. 428, 48 N. Y. Supp. 175), said: "While the corporation continues to do business, or, as is sometimes said, is a going concern; the law is settled in this state that a cash dividend is income and goes to the

que trust. On the 30th day of December, 1850, there was paid to the trustees on the shares of the Utica & Schenectady Company an extra dividend of 60 per cent. on the par value of its stock in the capital stock of said corporation at par, amounting to \$6,000. In May, 1853, a consolidation of the Utica & Schenectady Railroad Company, the Mohawk Valley Railroad Company, and other railroad companies took place, and a new corporation was created called the New York Central Railroad Company. By the terms and conditions of such consolidation the trustees received shares of said Central Company equal in number to those held in the two other companies, being 220 shares of \$100 each, and also received bonds of the Central Company to the amount of \$55 on each of the 220 shares held by them in the two other companies. It appears that the stock of the Central Company was then worth \$115 per share, and

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life tenant, no matter at what time the profits from which the dividends were declared may have accrued or have been accumulated. * * * The consensus of opinion without this state would seem to establish, as a general rule, that stock dividends are not income or profits, but are capital. * * * The question does not seem to have been decided in the highest court of this state. * * * But neither rule seems to have controlling effect in the disposition of the case before us. It is very clear that the dividend of the stock of other corporations is in no respect a stock dividend, as the term is usually employed; i. e., an increase of the nominal capital stock of the shareholders of a company. It is precisely the same as a dividend of cash, because the corporation might have sold the stock, and divided the money among its shareholders. In a stock dividend no money or property is withdrawn from the ownership or control of the corporation. But if the dividend be in cash or in stock of other corporations, in either case just so much property is taken from the corporation and the title to it is vested in the shareholders individually. To give the first rule any bearing on the subject before us it must be shown that the principle that "what the company says is capital shall be capital," is applicable to a case where capital and profits alike are distributed, where the company no longer retains any capital, and where its statement as to the distinction between capital and profits, unless supported by the facts, is its arbitrary declaration, since it has no further interest in the

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the bonds 90 per cent. of their par value. The court in its opinion, after referring to English and other authorities, say: "Uncontrolled by precedent, and considered upon principle only, the case seems very plain. * * * The stock payment of 60 per cent. made upon this investment was properly dividends extraordinary in amounts, not in manner of payment; that being a matter of policy with the company. 'Dividends,' as used in the will, is unqualified; it includes, in its technical sense, as well as in its ordinary and common acceptance, all distributions to corporators, of the profits of the corporation, whether such distributions are large or small. * * * The testator is presumed to have used words in their natural and primary sense, and from the terms used, in his will, it is clear that he intended that all the gains, profits, income, and proceeds of the two shares of his estate, of whatsoever kind, name, or

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subject-matter. It is this which, in my judgment, constitutes the radical distinction between a declaration of a dividend by a going concern and a declaration by a liquidating corporation. When the former declares a dividend, the title to the money is taken from the corporation and vested in the shareholder. Whether rightly or wrongly declared, as a matter of fact the money is separated from the share of stock. It is no longer a part of the capital of the company. When however a division is made of the assets of a liquidating concern, there is no actual separation of the funds of one class representing profits, from those of the other class representing capital. Both are paid over to the stockholders. The rule that the courts will not look to see from what source the dividend has been paid is a rule of convenience more than one of absolute justice * * *. But to support the claim of the life tenant in this case it would be necessary to show that the corporation had acted in the subject-matter when it distributed its assets and declared what part was profits and what part capital." After stating that the resolutions making the divisions and distribution left in doubt the question as to what part was capital and what part profits the court says: "In my opinion, the learned surrogate was correct when he held that the stock of the new company divided represented capital still to be employed in substantially the same enterprise and business in which it was invested at the time of the creation of the trust, changed in form but not in substance; while the cash

nature, should go to his daughters, as tenants for life; and that intention should not be defeated. If the payment of extraordinary dividends has impaired the capital, such capital should be restored by additions from such dividends. * * * But the case is different with respect to the bonds or certificates of the Central Railroad Company received by the trustees on the 17th of May, 1853. Those bonds were not paid to the trustees, either as interest, dividend, or proceeds; but as the difference between the value of the stock of the old railroad corporations and the new, and are therefore to be regarded as capital, the same as though no consolidation transfer had taken place, except that those bonds received as difference for the 60 shares will follow their principal and go to the cestuis que trust. Unless the parties otherwise agree, a referee must be appointed, to

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and securities divided were profits theretofore accumulated, but from that time released from the hazards of business, and turned over to the stockholders as profits. One hundred per cent. of the cash dividends, being the amount of the original investment, was held by the surrogate to form part of the capital of the trust estate in addition to the stock of the new corporation."

A testator in *Clarkson v. Clarkson* (18 Barb. 646), left part of his estate in trust to be invested by his trustees, and directed them to pay the interest, dividends and proceeds, arising therefrom to his two daughters. A stock dividend of 60 per cent. was declared by the corporation whose stock had been purchased by the trustees. The court held that this belonged to the life tenants. Thereafter the corporation consolidated with others and the trustees received, in addition to the stock of the new corporation, bonds or certificates of the corporation. The court held that as these bonds were paid as the difference between the value of the stock of the old corporations and the new they were to be regarded as capital and belonged to the corpus.

d. When derived from sale of assets.

Where a portion of the plant or property of a corporation is sold and the proceeds divided among its stockholders, it constitutes a distribution of the assets and capital, and is therefore, in case of stock held by a trust-

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ascertain the present value of the remaining 160 shares of the Central railroad stock held by the said trustees, and the value of the remaining bonds or certificates, and report the same to one of the justices of this court. Upon the coming in of that report, should the value of such stock and bonds and certificates be equal to the capital invested, or if deficient, upon the tenants for life making up such deficiency, a decree will be entered, directing said trustees to deliver over to the cestuis que trust the 60 shares of stock dividend, the bonds and certificates received on the same, and all dividends thereon received by said trustees." 18 Barb. 656. It will be seen that the price paid for the stock was treated as the capital invested by the trustees, and that it was held that the cestui que trust was entitled to all dividends of every kind declared upon the

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tee, to be held by him as part of the capital and not as income. *Matter of Skillman's Estate* (9 N. Y. Supp. 469, 2 Con. Sur. 161). In that case the court says: "This was clearly a sale of one-half of the plant or property constituting the assets and capital of the company, and was simply a change of so much of its capital into money. It was not a dividend declared out of surplus earnings or profits, or a fund derived in any way from the earnings of the corporation. The resolutions did not contain the word "dividend," or attempt to characterize what was divided as "income" or even call it a "division of profits." And the court further says: "The early English rule, that all stock dividends, so called, together with all extra cash dividends of bonuses, belong to the remainderman, has been so changed that dividends in money, which came from earnings of the capital invested, belong to the life tenant. (Perry on Trusts (4th ed.) § 545.) The converse of this proposition is that dividends which do not come from the earnings of the capital invested belong to the remainderman."

In *Matter of Stevens* (187 N. Y. 471, 80 N. E. 358), testatrix left shares of stock in the Brooks Locomotive Works in trust. Subsequent to testatrix's death the plant and properties of the Brooks Company were sold to the American Locomotive Co. The price paid was several times the estimated value at the time of testatrix's death, and it was the distribution of this enhanced value between income and principal of the trust fund

stock, so far as the same did not intrench upon such capital of the trust fund. An apportionment of the dividends was provided for if necessary to preserve the principal of such trust fund.

In *Simpson v. Moore*, 30 Barb. 637 (1859), one Wilson died in 1837 leaving a will by which he gave one-sixth of his estate in trust "to retain and invest, and keep invested from time to time, * * * upon real estate security or in stocks" by them deemed safe, "and to apply and pay over the income thereof," from time to time, as it may be received, "to my wife, * * * during her life." The will directed that after the death of his wife such one-sixth of the estate be divided among the children of the testator. The trustee in the year 1844 purchased 69 shares of the national bank at \$50 per share, that being the par value thereof. The charter of the bank expired January 1, 1857. The bank was reorganized, and preparatory thereto it declared a dividend of 18 per cent. The trustee

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which gave rise to the controversy in this case. The court held that the amount received for good will on the sale of the works, could not be deemed income, but was properly awarded to principal of the trust as an appreciation in the value of the *corpus*.

In *Riggs v. Cragg* (26 Hun, 89), the court in holding that a stock dividend was not income said: "A stock dividend of five per cent. was declared by the New York Gaslight Company in October, 1853, which was received by the executors. But it appeared by the evidence that the fund out of which the dividend was made, formed no part of the earnings of the company, but it was realized by a sale of its real estate on Canal, Centre, and Hester streets in the city of New York. This dividend accordingly was not governed by the legal principle indicating the appropriation proper to be made of stock dividends declared out of surplus earnings; for it was really made from the proceeds of property constituting a part of the capital of the corporation, and which the directors considered themselves justified in declaring in the then financial condition of the corporation. It was not appropriately income received by the estate, but it was in the nature, so far as it extended, of a change of its capital. It was properly therefore, so regarded by the executors, and it could

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took the dividends in new stock. The trustee also in 1848 purchased 50 shares of the stock of the Merchants' Bank at \$50 each, that being the par value thereof. The charter of that bank expired January 1, 1857, and preparatory to reorganization it declared a dividend of 26 per cent. and the trustee took such dividend in new shares of the bank. A question arose as to whether the stock constituting such dividends should be delivered to the wife, who was entitled to the income for life, or be held for the benefit of the remaindermen. The court say: "The testator intended all the income of the property which he ordered to be invested should be paid to the wife, but that the capital so invested should be preserved. Under the case of *Clarkson v. Clarkson*, 18 Barb. 646, the payments in question must be considered as dividends; but as they contained part of what was held as capital when the stock was purchased, so much thereof as was necessary to make up the original investment, over and above the par value of the stock taken by the trustee

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not be carried into the accounts as income of the estate." (This case is reversed on another point in 89 N. Y. 479, 11 Abb. N. C. 401.)

In *Matter of James* (146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774), the stock, on which the dividends in question were declared, was of three construction companies. The capital of these corporations, at the death of testator, consisted of railway lands and certificates of indebtedness received on the sale of railways. After testator's death, dividends were paid from the sale of lands. These dividends were held to be income. The court at General Term (78 Hun, 121, 28 N. Y. Supp. 992), said: "The general rule applicable to dividends declared upon corporate stock may be conceded to be as claimed by the contestants, viz.: that, as between a life tenant and remainderman all dividends paid from property in which the capital of a corporation is invested, or the proceeds thereof, belong and go to the remainderman, while all dividends from current or accumulated earnings go to the life tenant. That rule is applicable to corporations which employ their capital in business enterprises and earn an income from such employment; but it is not necessarily applicable to the dividends of such a corporation as those under consideration. The fact that the dividend is paid from capital is not conclusive as to the right

in exchange, should be retained by him, and the residue belongs to the plaintiff." 30 Barb. 640. It will be seen that provision was made to keep the principal of the trust fund unimpaired.

In *Matter of Woodruff*, 1 Tuck. 58 (1865), a testator died in 1855, leaving a wife, five sons and four daughters. He left the residuum of his estate in trust for the benefit of his widow and the remainder over to his sons. There came into the hands of his executor from his estate 904 shares of the capital stock of

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of the life tenant to receive it. Mining and coal companies and all corporations whose capital is invested in property which is quarried and sold in the market pay their dividends from proceeds of their capital. When their mines and quarries are exhausted their capital is gone and dividends cease. But it would hardly be claimed that the annual dividends declared by such did not fall within the general designation of earnings. The corporations under consideration were not engaged in any "business," as that term is ordinarily understood. Their capital was in lands, and they had no service of income other than the sale of lands. Dividends were declared out of the capital, and could not be derived from any other source. They divided not only earnings from increase in value of lands, but capital in the proceeds of the sale of land itself. This was understood and contemplated by all stockholders in the corporation. Under the rule applied by the surrogate, if all sales were for cash there would be no income to the estate until dividends were reinvested, but if sales were on credit income would be derived from interest on deferred payments. There is, in my judgment, a clear distinction between dividends paid by a corporation of the character of those named and dividends on the stock of a corporation which employs its capital in ordinary business. * * * And if the bequest was specifically of the income or dividends on stock in question, there would be no doubt that the testator intended such dividends as should in the ordinary course of events be declared and paid upon the stock. The same result, I think follows from the bequest as actually made. We must construe it with the intent of the testator. He gave to his wife one-half of the income of all his property of every kind of which he should die possessed. These stocks formed a material part of the estate. By the words "income" he clearly intended to include the dividends upon them, as they would constitute the only income to be derived from them. He knew there would be no earnings except from the sale of land, and, hence, that the dividends would be paid from the property in which the capital

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the Manhattan Gas Light Company. Two days after the testator's death the Legislature authorized an increase of the capital stock of the corporation from \$2,000,000 to \$4,000,000. Thereafter and in 1855 the corporation declared an extraordinary dividend out of the surplus profits of the corporation of \$18 per share. The executor and trustee accepted new stock, and the dividend was credited thereon. It was held that the dividends belonged to the widow. In this case, however, the

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was invested. He could not have intended that income should be limited to interest on contracts of sale, as there might not be any such contracts, nor to interest on dividends after they should have been received by the testatrix and reinvested, for he gave her the income on property which he possessed at his death. In my opinion he intended his widow to have such dividends on the stocks in question as the corporations from the natural of their business and property would ordinarily make. The fact that the life tenant might possibly thus acquire the whole stock, is incidental to the character of the corporation and the manner in which the capital was invested."

In *Matter of Elting* (33 Misc. 675, 68 N. Y. Supp. 1118), the trust estate contained certain shares of railroad stock. Subsequent to testator's death the railroad company leased all of its property except two pieces of real estate. This real estate was thereafter sold and dividends paid from the proceeds. The court held that such dividends represented capital and belonged to the remaindermen.

e. Effect of Code of Civil Procedure.

In *Matter of Brandreth's Estate* (64 App. Div. 566, 72 N. Y. Supp. 333), by agreement, the testator was to receive the income during his life of certain stock left to his four daughters. The corporation declared and paid a dividend on October 28, 1897. Testator died Nov. 15, 1897; and the corporation declared another on Nov. 27, 1897. The court held that the dividend declared Nov. 27th, 1897 was not apportionable but belonged to the daughters; and that § 2720 of the Code of Civil Procedure did not apply as that was confined in its operation to certain sums made payable or becoming due at fixed periods, and the corporate dividends were not payable at fixed periods.

question of the impairment of capital was not considered and the decision purports to be based on *Clarkson v. Clarkson*.

In *Goldsmith v. Swift*, 25 Hun, 201 (1881), a person by deed of trust in 1856 transferred 100 shares of the New York Central Railroad Company to a trustee to pay to the maker of the trust all dividends declared on said stock during his life, and after his death to his daughter during her life, with remainder over to the descendants of the daughter. In 1868 the company issued to its shareholders certificates to the amount of 80 per cent. of the capital stock held by them, respectively, as evidence of earnings expended for the purpose of constructing and equipping its road and in the purchase of real estate and other properties.

In 1869 the company was consolidated with the Hudson River Railroad Company, and the new company, to equalize the values of the two companies, issued new stock in place of the stock held under the deed of trust, the certificate for the 80 per cent. thereof, and an additional 27 shares, making 207 shares in all. The court held that the 27 shares were a part of the corpus of the trust fund, but that the 80 shares were a dividend belonging to the cestui que trust. It does not appear that any part of the earnings was accumulated prior to the creation of the trust.

Cragg v. Riggs, 5 Redf. Sur. 82 (1880), was a proceeding in Surrogate's Court for an accounting. The will of the testator provided a trust by which the net interest, dividends, or other periodical income thereof was given to a daughter for life, and after her decease to her descendants. The question arose as to what should be done with certain stock dividends declared upon stock held in the trust. The court, referring to many cases in this and other states, and particularly to the decision in the case of *Clarkson v. Clarkson*, says: "The real inquiry is how much of the stock dividend was capital, or made to represent an increase in the value of the property, and how much came from income or earnings, and also how much of the stock dividend was made up of accumulations before, and how much from earnings after, the investment. And this, it seems to me, is the

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rational and equitable rule by which to determine the question as to the relative rights of the life tenant and remainderman." The court further says "that the trustee, in the adjustment of those rights, should look to the real question, whether the dividends represent income or profits, or capital, without regard to the form of the dividend, or the name by which it is declared. Otherwise the ipse dixit of the corporation would be substituted for the judgment of a court, which alone has competent jurisdiction." The court concluded that the stock dividend was income or profits and should be credited to the income account. It further said: "But it is my duty to say that if there were anything in this case to warrant the conclusion that any of the dividends so declared, whether in cash or stock, included income earned before the death of the testator and before the rights of the life tenant attached, I should deem it my duty to send the matter to a referee to take an account in respect thereto." This case was appealed, and the decision in the General Term is reported in 26 Hun, 89, at page 102 (1881), and in the opinion, the court say: "Under the resolution which was adopted it was stated that the funds of the company had been accumulating for 20 years past, and that a special dividend of \$50 a share should be declared * * * when this accumulated fund was acquired, was not otherwise made to appear than by the statement of it contained in the resolution, * * * but if evidence of that nature had been given it could not very well have produced any change in the determination, for the reason already stated, that dividends are not apportionable, but are legally considered as accruing only from the time when they may be declared. This dividend was declared nine years after the estate had passed into the hands of the executors."

An appeal was then taken to this court and it is reported in 89 N. Y. 479, at page 487 (1882), where the judgment of the General Term and the decree of the surrogate were reversed for lack of jurisdiction. In the opinion of the court it is said: "Are stock dividends, representing earnings and profits of a corporation, expended in construction or improvements of the corporate property, declared during the life tenancy, to be regarded

as between the life tenant and remainderman, as accretions to the capital, or as income? If declared out of the accumulated profits earned before the inception of the life tenancy, are they capital or income as between these two interests? If they represent earnings made partly before and partly during the life tenancy, are they apportionable? The right to stock dividends as between tenant for life and remainderman has not been considered by the court of last resort in this state. The decisions upon the subject in other states and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates."

In *Matter of Kernochan*, 104 N. Y. 618, at page 627, 11 N. E. 149, at page 152 (1887), it appeared on an accounting by executors that a corporation had declared a dividend of \$24.26 on each share of certain capital stock held in trust by the executors. The court, referring to the action of a referee appointed in the proceeding, say: "The referee made the apportionment in question by ascertaining how much was earned before and how much after the death of the testator, and, so doing, applied a rule which may be founded on general equity, namely, that when a fund is given for life to one beneficiary, and remainder over, the first shall have its earnings after his life tenancy begins, and the remainderman the balance. I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule, which gives cash dividends declared from accumulated earnings or profits to the life tenant, should be applied. The direction to his executors is to receive the rents, interests, and income of his estate, and apply the net amount of such rents or other income (with certain exceptions not now material) to the use of his wife. From the shares in question no income could accrue, no profits arise to the holder until ascertained and declared by the company and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator, and not the

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earnings or profits as ascertained by a third person, or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise."

In *Matter of Warren* (Sur.), 11 N. Y. Supp. 787 (1890), the testator died in 1879. He had subscribed at the organization of the Newburgh National Bank in 1864 for 50 shares of the capital stock, for which he paid \$5,000. The will of the deceased gave to his wife the use, interest, and income during her natural life of the rest and residue of his estate and the remainder over to persons named. In 1890 the bank by resolution returned to the stockholders one-half of the capital of the bank at par, with premium of 40 per cent. payable out of the surplus profits. On an accounting in the estate the court say: "This payment of 40 per cent. on that part of the capital of the bank which was retired was, however, an unusual and extraordinary dividend, and that may be a doubt whether it is to be considered as a dividend of earnings to the shareholders, or whether it should not be considered a payment back to the shareholders of capital." It did not appear when the surplus was earned, and the 40 per cent. was awarded to the widow.

In *Matter of Rogers*, 22 App. Div. 428, at page 432, 48 N. Y. Supp. 175, at page 178 (1897), the questions before the court relate to the division of the property of a corporation in liquidation. The opinion is an instructive one, and in it the court, referring to a going concern and to extraordinary dividends, says: "When the former declares a dividend the title to the money is taken from the corporation and vested in the shareholder; whether rightly or wrongly declared, as a matter of fact the money is separated from the share of stock; it is no longer a part of the capital of the company. * * * The rule that the courts will not look to see from what source the dividend has been paid is a rule of convenience, more than one of absolute justice. In certain states, as in Pennsylvania, the rule is repudiated. In *Vinton's Appeal*, 99 Pa. 434, 44 Am. Rep. 116, it is said: 'The rule * * * is a very simple and convenient one, and may relieve trustees and courts of much trouble, but it is certainly not one that commends itself

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for its justice and equity. * * * To us it seems like a bungling rule of law that, at one time, would give what is indisputably income to the remainderman, and, at another, what is as clearly capital to the life tenant.' I imagine that, in an instance of a dividend made by a going concern, the dividend might proceed to such an extent from the alienation of the capital or of the franchise of the company as to shock the sense of justice, if held income, and to make it an exception to the rule even in this state."

In *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L.R.A. 230, a testatrix, Caroline Cuyler, died September 18, 1888, owning 254 shares of the Western Union Telegraph Company stock. A resolution of the board of directors of the telegraph company was adopted at a meeting held September 14, 1892, recommending an increase of the capital stock from \$86,200,000 to \$100,000,000. At another meeting held November 10, 1892, it was further resolved that out of the increased stock amounting to \$13,800,000 there be distributed and transferred to the credit of stockholders of record on the 19th day of November, 1892, issuable on and after December 3, 1892, an amount equal to 10 per cent. of the stock held by the stockholders respectively, and that the remainder of the increase be held in the treasury subject to the further order of the board of directors. It appears by stipulation that the surplus earnings of the telegraph company on September 30, 1888, were \$7,766,380.81, and on September 30, 1892, \$14,455,757.16. The new stock distributed amounted to \$8,620,000, being more than the difference between the surplus of September 30, 1888, and that of September 30, 1892, but perhaps not more than the difference between the surplus September 18, 1888, the date of the death of the testatrix, and December 3, 1892, the date provided by the board of directors for the actual issue and distribution of the new stock.

In this case the appellant sought to have a different rule applied in the case of a stock dividend than would be applied in the case of a cash dividend. He did not attempt to show that the stock dividend was for an amount in excess of the earnings

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of the corporation accumulated subsequent to the death of the testatrix. The respondent insisted that the stock dividend should be given to the beneficiaries for years of the trust because the testatrix intended, as shown by her will, that such beneficiaries should have all dividends regardless of the question as to whether such dividend had been earned after or prior to her death, and he also contended that it should be given to the defendants as such beneficiaries because it represented earnings accumulated after the death of the testatrix. The court clearly holds that no distinction should be made between a stock dividend and a cash dividend on that ground alone. It did not discuss the question as to whether a dividend partly earned before the death of a testator and partly earned after the death of a testator, whether the same was payable in cash or in stock, should be apportioned between the beneficiaries for years or life, and those entitled to the residue.

In *Chester v. Buffalo Car Mfg. Co.*, 70 App. Div. 443, at page 451, 75 N. Y. Supp. 428, at page 433, it is held that a stock dividend therein considered was but an increase of the capital stock in order to make such capital stock correspond with the actual working capital of the corporation. In the opinion, the court say: "While it is subject to modification and variation, the natural and fundamental idea of life income payable under a will is of that current income which accrues and becomes payable from time to time during the life tenancy, upon a principal fixed as of the time when the trust took effect, and remaining substantially unchanged. Sometimes the amount of this principal is fixed by directions for the investment of a definite sum, and at other times by the appropriation of specified securities as bonds or stocks. In the case of the latter, while it may happen that by means of an extraordinary dividend there will be allotted to the life tenant a certain per cent. of profits which accrued before his estate commenced, that is the usual course rather than otherwise. We certainly do not expect or readily accept such a solution between the life tenant and remaindermen through the medium of dividends as will divide a testator's estate as it existed at his death between the

former and the latter in the proportion of three or four shares to the former for one to the latter."

In *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, at page 138, 64 N. E. 796, at page 797, John Lowry, the testator died January 26, 1895, the owner of 50 shares of the capital stock of the Pullman Palace Car Company. The Farmers' Loan & Trust Company became a trustee under his will. While holding the trust and in the fall of 1898 the car company declared a stock dividend of 50 per cent., payable to the owners of its capital stock on the 15th day of November, 1898. The court held that the dividend belonged to the life beneficiary. The testator provided by his will that: "The entire income from such securities shall be applied as income, irrespective of the price paid for the securities or the subsequent value thereof; it being my will that no part of such income shall be diverted to form a sinking fund to replace any loss to the principal by depreciation in value of the securities." The decision in that case might well have proceeded on the language of the will, for it was entirely within the power of a testator to make that income which by law, without testamentary disposition, would be principal, though a testator has not that power in the reverse direction. *Pray v. Hegeman*, 92 N. Y. 508; *Hascall v. King*, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302.

In *Robertson v. De Brulatour*, 188 N. Y. 301, at page 306, 80 N. E. 938, at page 940, John T. Farish, the testator, died May 13, 1891, leaving a will in which he created a trust for the benefit of his wife. He owned at the time of his death 2,500 shares of the capital stock of the New York & Harlem Railroad Company and also certain shares of the capital stock of the Chicago, Rock Island & Pacific Railroad on each of which shares of stock extraordinary dividends were subsequently declared which were awarded to the life beneficiary. Judge Gray, who wrote the opinion in this court, referring to the provision for the testator's wife, said: "I entertain the opinion that the trust clause of this will is comprehensive enough to include the extraordinary dividends, or distributions, in question, however they may be termed, which were made by the New York &

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Harlem Railroad Company and by the Chicago, Rock Island & Pacific Railroad Company." The decision in this case may well have been left upon the construction of the will as stated by the court.

In *Thayer v. Burr*, 201 N. Y. 155, at page 157, 94 N. E. 604, it appears that Frances A. C. Headley died March 25, 1884, and by her will created a trust. She died owning 58 shares of the stock of the Adams Express Company, which were thereafter held in said trust. On February 9, 1898, the express company distributed \$12,000,000 of its bonds among its stockholders, being \$100 per share, and on June 17, 1907, another distribution of \$24,000,000 of its bonds was made, being \$200 per share. When the trust came into being the assets of the company amounted to \$14,050,000. When the last distribution of bonds was made it amounted to \$40,800,000. The court in the opinion say: "The difference between these two sums is \$26,750,000. The total distribution of bonds was \$24,000,000. On this statement the amount distributed did not equal the amount of the earnings during the trust period, but the result is modified by the stipulated fact that in the valuation of the assets at the termination of the trust \$7,000,000 represented, not earnings, but simply the increased or enhanced market value of the securities held by the company. It is very plain that the life tenant was not entitled to this increase in the value of the corpus of the trust any more than she would have been chargeable for any depreciation in the value of the corpus. The true earnings, instead of being \$26,750,000, were \$19,750,000, and of the \$24,000,000 of distribution, \$4,250,000 represented in reality the distribution of capital. Therefore the life tenant was entitled only to 1,975 of the 2,400 parts of the bonds she received, the other 425 parts belonging to the remaindermen." The decision was intended to be a recognition of the right to an apportionment of the dividend so as to preserve the corpus of the trust estate. The division was computed upon that basis, as incontestably appears from the fact that the *amount of the trust fund at the creation of the trust was in fact preserved*. As stated by the opinion the court deducted from the assets of the

corporation at the last distribution the *total assets* at the creation of the trust (\$40,800,000 — \$14,050,000 = \$26,750,000). Then from the \$26,750,000 the \$7,000,000 increase in value of assets was deducted, leaving \$19,750,000 and by so doing an intrenchment upon the assets of the corporation is shown of \$4,250,000. An apportionment of the dividend was made accordingly. The judgment of the court was based upon the necessity of preserving the trust fund as it existed at the creation of the trust, including accumulated earnings of the corporation prior to that date. It was not based upon the alleged right in the life estate man to all dividends so long as they did not intrench upon the capital of the corporation.

In *Matter of Harteau*, 204 N. Y. 292, 299, 97 N. E. 726, 278, a dividend from the surplus earnings of the Metropolitan Plate Glass Insurance Company was considered. As stated by Judge Bartlett in the opinion the questions involved were: “(1) * * * (2) Is the sum received by the executors and trustees for the additional stock purchased with the surplus dividend of the Metropolitan Plate Glass Insurance Company to be regarded as *capital or income*?” Subsequently, referring to the second question, he says: “The question *whether the surplus dividend is to be deemed capital or income depends upon the time of the acquisition of the surplus which was divided*. The amount of the dividend was \$100,000; the findings of the surrogate show that on December 31, 1895, shortly after the testator’s death, the surplus of the Metropolitan Plate Glass Insurance Company was \$190,000, and that at the time of the adoption of the resolution for the dividend it was \$279,000, an increase of \$89,000 within that period. This increase which, under the doctrine of *Robertson v. De Brulatour*, 188 N. Y. 301 [80 N. E. 938]; *Thayer v. Bun*, 201 N. Y. 155 [94 N. E. 504], and other cases, is to be regarded as income, was 89 per cent. of the total dividend, and consequently 89 per cent. of that portion of the dividend which went to the executors must also be deemed income. This amounted to \$17,722.39. * * * It follows that the order of the Appellate Division and the decree of the surrogate should be modified so as to

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charge the executors and trustees with \$17,722.39, instead of \$19,912.80, as income arising out of the proceeds of the sale of 160 shares of the Metropolitan Casualty & Insurance Company, and with the balance thereof as capital of the estate." This modification was an express recognition of Judge Bartlett's statement that whether "*The surplus dividend is to be deemed capital or income depends upon the time of the acquisition of the surplus which was divided.*"

The extended statement of the principal and most frequently quoted decisions in this state relating to the question involved has seemed necessary because of the difference of opinion expressed by counsel relating thereto. It will be seen that the earlier and also the latest decisions in this state clearly recognize and assert that where extraordinary dividends intrench upon the capital of the trust fund they should be returned to such trust fund so far as necessary to preserve the same. Recognizing as we must that a testator or maker of a trust may, if he chooses, provide that a part of the principal of a trust fund be paid to a life beneficiary of the trust, and that the courts must carry out such intention, all of the decisions in this state can be sustained without violating the right when it is not so controlled by the instrument creating the trust, to have the principal of the trust fund kept unimpaired by the division of accumulated surplus among life beneficiaries.

It is conceded that the capital of a corporation cannot be divided among the life beneficiaries. It is not alone the *capital of the corporation* that should be preserved, but the *capital of the trust fund*, whether invested by the trustees in stocks of corporations at a premium, or acquired from the testator or maker of the trust. The surplus of the corporation existing at the formation of the trust or when the stock is purchased represents a part of the capital of the estate as fully as does the capital of the corporation. The division by corporations of their surplus, accumulated through a long period of years in very large amounts, is now comparatively common, when until within a very recent time such division of enormous amounts was seldom, if ever, made.

Recently a well-known bank in this state with a capital of \$300,000 and a large surplus divided its surplus by declaring an extra dividend of \$2,700,000, or 900 per cent., and increased its capital stock to \$3,000,000, allowing its stockholders to subscribe for the increase and pay for the same by the dividend thus declared.

Another well-known bank in this state with a capital of \$500,000 and a very large surplus divided its surplus by declaring an extra dividend of \$9,500,000, or 1900 per cent., and increased its capital stock to \$10,000,000, allowing its stockholders to subscribe for the increase and to pay for the same by the dividend thus declared. Instances of the declaration of very large extraordinary dividends by corporations within the last few years could be multiplied in great numbers.

We refer to these cases simply to illustrate the great injustice that may be done to the ultimate beneficiaries of a trust fund if a large part of such fund as invested must necessarily, by reason of an extraordinary dividend and an arbitrary rule, be paid over to the life beneficiaries of the trust. If dividends by a corporation payable out of surplus earnings whenever accumulated must be paid to the life beneficiaries of the trust unless special provision to the contrary is made in the will or instrument creating the trust, it will make the retention or purchase of stocks by a trustee in corporations having a large surplus a matter of questionable propriety. It must also be remembered that if all such dividends are adjudged to constitute income as a matter of law, then their retention in the trust, even by direction of the testator or maker of the trust, would, in many instances, amount to an unlawful accumulation of income.

We think that in each case the court should look into the facts, circumstances, and nature of the transaction and determine the nature of the dividend and the rights of the contending parties according to justice and equity.

In Cook on Corporations (6th Ed. c. 33, § 552), it is said: "Where shares of stock are held by an estate, and the income of the estate is to go to a life tenant for life, and the remainder to another party, the question of whether the life tenant or the re-

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mainderman is entitled to a stock dividend or extraordinary cash dividend is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life tenancy began. In that case it is clear that in justice the remainderman should receive it. If, however, it was earned after the life tenancy began, it is clear that the life tenant should have it. If it was earned partly before and partly after the life tenancy began, then it is apparent that in justice some apportionment should be made if possible."

In Thompson on Corporations (2d Ed., § 5415), it is said: "The courts now inquire into the actual nature and source of dividends for the purpose of determining their character, and, as between the life tenant and remainderman, if they are found to represent earnings that accrued prior to the creation of the trust, they belong to the corpus of the trust; or if they represent the natural growth and increase in the value of the corporate plant and business, whether that growth and increase took place before or after the trust was created, they are to such extent capital. The court, in making the inquiry, concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it, and the fact that a dividend is distributed in cash or stock is said to be of little importance in determining whether it is capital or income. * * * The object of the inquiry in every case should be to do justice to the life tenant and remainderman, and at the same time effectuate the intention of the creator of the trust; and on this theory in order to effectuate such intention and to do justice between the parties, a court may, under the circumstances of a given case, apportion a dividend between the life tenant and the remainderman."

It is manifest that any apportionment of a dividend is more or less troublesome in the practical handling of trust estates. It may be necessary in many cases to make the apportionment of dividends in an accounting by the trustee where all the parties interested are bound thereby. The dividends usually declared by corporations are the ordinary dividends such as are declared from year to year or at other regular dividend periods.

Extraordinary dividends are the exception. In all cases of ordinary dividends the courts uniformly hold that they should be paid to the life beneficiary of the trust in conformity with the general rule that dividends are deemed to have been earned as of the date of their declaration. In cases of extraordinary and unusual dividends declared in whole or in part from earnings actually accumulated prior to the creation of the trust or the purchase of the stock, an adherence to the rule that dividends are deemed to have been earned as of the date of their declaration in many cases shocks the sense of justice.

Notwithstanding the difficulty in many cases of apportioning dividends, it is wiser and better to leave an apportionment to courts of equity, in preference to adhering to a rule that depends more upon its simplicity and convenience of enforcement than upon justice and right. The distinction between ordinary and extraordinary dividends is necessary to make a workable rule, and at the same time preserve the integrity of the trust fund. The integrity of the trust fund and rights of the life beneficiary under the trust should each be considered, determined, and preserved by a court of equity. As far as the courts in this state have made statements to the contrary, it has been in opinions where such statements have been unnecessary to the determination of the case then under consideration, and such statements are disapproved. It should be held: (1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or appropriated between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.

It has been argued that the will in this case as quoted shows

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that the testator intended that the value of the stock of the Singer Manufacturing Company owned by him at his decease should be preserved inviolate, and it is also argued that it was not the intent of said corporation, as shown by the resolution quoted, to distribute the surplus of the corporation, but to capitalize it so that thereafter it should be incapable of distribution. It is not necessary to discuss the question so presented, in view of the decision that we are making herein.

This case is one that requires an apportionment of the dividend. There is no dispute about the portion thereof that was earned prior to the creation of the trust, and the decree of the surrogate and order of the Appellate Division should be modified so as to award ~~11111111~~ parts of the stock dividend to the respondent, and directing that the remainder thereof be retained as a part of the capital of the trust fund, and, as thus modified, the order and decree should be affirmed, with costs to the appellant and respondent payable out of the estate.

GRAY, J. (dissenting). I think we should affirm the determination made below. The question presented by this appeal relates to the application by the trustee of a testamentary trust of a stock dividend, and, in reaching a determination, the court below unanimously concurred in following the rule laid down by this court in the cases of *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L.R.A. 230, *Lowry v. Farmers' Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796, and *Robertson v. De Brulatour*, 188 N. Y. 301, 80 N. E. 938.

Eugene La Grove, deceased, by will, gave his residuary estate to a trustee, in trust, to hold the same and "to collect the rents, issues, income and profits therefrom and to pay the net rents, issues, income and profits therefrom, quarterly, to my wife from the time of my death, during the term of her natural life." Upon the wife's death, the will provided for the division of the principal of the trust among children of the marriage; or, in event of there being none, then, among such persons as would be entitled to share in the wife's estate, in case of intestacy, under the statute of distributions in this state. At the

testator's death there were no children of his marriage. A portion of his estate consisted in 3,000 shares of the capital stock of the Singer Manufacturing Company. Within two years of the testator's death, the board of directors of the company declared a stock dividend of 100 per cent., and therefore the trustee received from the company a certificate representing 2,920 shares of the new stock; 80 shares of the estate holdings having been sold. The findings of fact, with respect to the declaration of this dividend, were that it "was declared and paid out of accumulated net surplus," that the "dividend did not intrench upon the capital," and that the "stock dividend represented income solely." It was found that the company had accumulated the surplus from which the dividend was declared exclusively from earnings made in the business, and not from any disposition of the capital of the company. The question is whether the trustee should pay over the shares of new stock received by him to the beneficiary, or whether he should retain them in the trust.

The question should no longer be regarded as an open one. The cases, which the court below has followed, laid down a rule, which is precisely applicable to the facts in the present case, and when the question first came up for decision, in *McLouth v. Hunt*, *supra*, its determination was imperatively demanded. It had become necessary that a rule should be established upon a fundamental principle, and the members of this court agreed in that decision. Prior thereto, in the case of *Riggs v. Cragg*, 89 N. Y. 479, 487, a decision of the question was not required: but Judge Andrews, speaking for the court, observed that the decisions upon the subject in other states and in England were conflicting, and that "it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others." The occasion did arise in *McLouth v. Hunt*, in 1897, and the question received elaborate consideration. We were aware that it had been considered in the Supreme Court of the state, and that the view there taken differed from that taken by the English courts, by the Federal Supreme Court, and by

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the Massachusetts Supreme Court; but, upon a consideration of the question, upon the cases, and upon principle, it was determined that a stock dividend, which represents a disposition of accumulated earnings, or profits, belongs to the life tenant of the trust estate. In that case, the Western Union Telegraph Co., by a capitalization of accumulated earnings, made and retained in its hands from time to time, increased its capital stock from \$86,200,000 to \$100,000,000, and declared a stock dividend of 10 per cent. to its stockholders, among whom were the plaintiffs, the testamentary trustees of a trust to pay over the full income to beneficiaries named. It was held that, while the corporation may convert earnings into capital, in so far as life tenants and remaindermen are interested in the question, it is not affected by the mere fact of the ownership of the earnings. In that case, the earnings, which were thus distributed, had accumulated for 10 years; six of which preceded the death of the testator. It was considered by the court that the transaction of issuing to stockholders stock certificates against accumulated earnings "was, in substance, a distribution of profits."

The question next arose, in 1902, in the case of *Lowry v. Farmers' Loan & Trust Co.*, supra. There the trust was to apply the rents, issues, and profits to the use of beneficiaries named, and the trustee received an extra stock dividend of 50 per cent. upon shares of stock of the Pullman Palace Car Company, held in the estate. The dividend had been declared and paid from the "accumulated net surplus at the credit of income account," and this accumulation had existed, at approximately the same figure, for some years prior to the testator's death. The question was carefully considered in the light of the decisions, and the rule enunciated in *McLouth v. Hunt* was followed, without dissent. It was held that, by the declaration of a stock dividend, the stockholders received the representative of income and not of capital. "That which the directors of the corporation distribute among its stockholders, without intrenching upon capital," it was said, "must be comprehended within the term 'profits,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary."

* * * It was simply a mode of distributing the profits earned by the employment of the capital." 172 N. Y. 145, 64 N. E. 798.

Again, the question came up to this court in *Robertson v. De Brulatour*, supra, in 1907, and was decided with deliberation. The trust in that case was to apply the income and profits of a fund created by the testator to the use of his widow. A cash dividend from an accumulation of surplus running over 26 years, 18 of which preceded the testator's death, was made by the New York & Harlem Railroad Company. This dividend and a stock dividend declared by the Chicago, Rock Island & Pacific Railroad Company, and covering income during the testator's life, were adjudged to be income, payable to the beneficiary. The cases of *McLouth v. Hunt* and of *Lowry v. Farmers' Loan & Trust Co.*, supra, were approved as establishing the principle that dividends, which distribute accumulated earnings, should be treated as income and go to the life tenant. The portion of the opinion in *McLouth v. Hunt* was referred to with approval, which held that where the rents, issues, and profits of the trust estate were to be applied to the use of the beneficiary, stock dividends were comprehended within the term "profits."

The question which arose in *Thayer v. Burr*, 201 N. Y. 155, 94 N. E. 604, related to a distribution by the Adams Express Company of bonds, by way of dividend among its stockholders. The trustee, in that case, received bonds proportionately to the shares of stock held in the trust created by the will. The rule established in the preceding cases was not questioned. It was held that, so far as the bonds distributed by the company represented actual earnings of the corporation, the life tenant was entitled to them, and so far as they represented, not corporate earnings, but simply the increased market value of securities owned by the company, that they should be held by the trustee for the remainderman.

Finally, in 1912, the question came up in *Matter of Harteau*, 204 N. Y. 292, 97 N. E. 726. In that case, the testator, by his will, provided for the creation by his executors of a fund,

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from which they were to pay \$1,200 a year to his wife, \$600 a year to his sister, and \$400 a year to his niece. Upon the death of his widow, the sum of \$35,000 was to be expended in the erection of a statute to Lafayette, and "whatever sum may remain in the estate" was to be applied to certain benevolent, or charitable, institutions. The testator's widow survived the other two beneficiaries, the sister and the niece. Subsequently, a cash dividend of 100 per cent., payable out of the company's surplus, was declared by the Metropolitan Plate Glass Insurance Company, with the privilege to the stockholders of subscribing at par for additional stock to the extent of 100 per cent. of their respective holdings. Harteau's executors, holding shares of the company's stock, availed themselves of the privilege and received a dividend in new stock. The question was whether it was to be disposed of as capital, or income. The previous cases were not discussed; nor was their authority brought in question. The point for decision was, inasmuch as the dividend, whether taken as a whole, or as apportioned as of the time of the testator's death, "exceeded the aggregate of the annual payments directed by the will and an accumulation of it would be unlawful," whether it should go to the corporations mentioned in the residuary clause, "as being the parties entitled to the next eventual estate," or to the estate of the deceased niece, as standing in that position. The decision was that the dividend should be apportioned, so that the increase of the surplus after the testator's death should be paid to the city on account of the legacy for the statute. There was no question as between life tenant and remainderman. Practically, as the dividend could not be paid to the annuitant, it all would go to the city, in time. By the decisions in *McLouth v. Hunt*, *Lowry v. Farmers' Loan & Trust Co.* and *Robertson v. De Brulatour*, the court has laid down a general rule, the correctness and authority of which have not been discussed, and therefore not affected by the cases of *Harteau* and of *Thayer v. Burr*. There is nothing to distinguish the facts of this case, in the principle of decision applicable from the facts of those cases, so far as the language of the will may be regarded. The widow is given the "rents,

issues, income and profits" proceeding from the trust estate, and that is as comprehensive as was the gift in the other cases. When the dividend is based upon a distribution of "profits" accumulated by the corporation, the rule established gives it to the life tenant. It would be a matter for grave regret if the conclusiveness of our decisions, so advisedly and deliberately reached, could now be called in question. It was said by Chancellor Kent, and his words are quoted by Judge Cooley in his work on Constitutional Limitations (*50): "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration, or exposition, of the law, and to regulate their actions or contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult, and people in general can venture to buy and trust, and to deal with each other." It is, in the highest degree, unwise, and it reflects discreditably upon the stability of our decisions, when, having established a rule for the guidance of executors and trustees, we allow it to become the subject of doubt and of renewed discussion. What is there in the present case upon which to argue for a reversal of the rule we have established, except the extraordinary size of the dividend? Certainly no new reasoning. But the size of the dividend was not considered to be an objection in *Lowry v. Farmers' Loan & Trust Co.*, where there was a stock dividend of 50 per cent., and it would be unfortunate, to say the least, to predicate upon that fact an argument for disturbing the rule heretofore deliberately adopted and declared by this court.

I, therefore, advise an affirmance of the order and decree appealed from.

CULLEN, C. J., and WILLARD BARTLETT, CUDDEBACK, HOGAN, and MILLER, JJ., concur with CHASE, J.; GRAY, J., reads dissenting opinion.

Judgment accordingly.

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Matter of Osborne.*(Court of Appeals, December, 1913.)***SAME CASE.***(209 N. Y. 450, 103 N. E. 823.)***1. Trusts — Extraordinary dividends — Method of apportioning.**

In all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired, and the remainder thereof must be awarded to the life beneficiary. The method of accomplishing this result is to ascertain the intrinsic value of the trust investment by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and then multiply that amount by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained the same way. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money, the amount of that difference is to be retained by the trustee as capital and the remainder paid to the life beneficiary; if in stock, the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good, the remaining shares going to the life beneficiary.

2. Trusts — Apportioning dividends — What may be considered.

Market value, good will, and the like cannot be considered in apportioning a dividend between a life beneficiary and remainderman.

3. Appeal and error — Remittitur — Amendment.

In a proceeding for the judicial settlement of an executor-trustee's account, a remittitur will be amended on appeal at the instance of the trustee so as to recite the appearance on the appeal of the remaindermen and their consent to be bound by the judgment therein.

4. Trusts — Trustee — Commissions — Stock dividend.

A trustee is not entitled to commissions on a stock dividend so far as it is retained in the corpus of the estate.

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Motion to amend remittitur on appeal to show method of apportioning extraordinary dividends, to recite the appearance of the remaindermen and their consent to be bound by the judgment, and to permit the trustee to sell part of the stock received from the dividend for the purpose of paying commissions to the trustee thereon.

Same appearances.

CHASE, J. The proposition decided by us in this case is that in all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired, and the remainder thereof must be awarded to the life beneficiary. The method of accomplishing this result is not difficult. The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money, the amount of that difference is to be retained by the trustee as capital and the remainder paid to the life beneficiary. If the dividend is in stock, the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good; the remaining shares going to the life beneficiary. Market value, good will, and like considerations cannot be considered in apportioning a dividend.

The direction that the life beneficiary should be awarded $\frac{1}{2}$ parts of the dividend was erroneous, and the number of shares awarded to her must be ascertained in the method hereinbefore described, which will give to the life bene-

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ficiary 999.1 shares and to the corpus of the trust 1,820.9 shares.

The motion of the appellant to amend the remittitur so as to recite the appearance on this appeal of the remaindermen and their consent to be bound by the judgment herein should be granted. So far as the stock dividend is retained in the corpus of the estate, the trustee is not entitled to commissions thereon. The very purpose of our decision is to make the corpus of the trust fund have exactly the same value after the division of the dividend as when the trust was originally created and on which the trustee has received his commissions. So far as the trustee is entitled to commissions on the amount awarded to the life beneficiary, which award of course is to be considered as income, it can be adjusted with such beneficiary or application therefor can be made to the surrogate.

The remittitur should be amended as herein provided. Ordered accordingly.

(*Court of Appeals, April, 1913.*)

**WILLSON, Appellant, v. FAXON, WILLIAMS
& FAXON, Respondent.**

(208 N. Y. 108, 101 N. E. 799. *Rev'g 147 App. Div. 920, 131 N. Y. Supp. 1151.*)

**1. Druggists — Retail druggists selling as manufacturer — Liability
— Public Health Law.**

A corporation of retail druggists, which purchases a patent or proprietary medicine from the manufacturers thereof, and sells the same in the original package but under a label designating it and not the real manufacturers as the manufacturers thereof, is liable, by reason of such representation, for any injury suffered by a purchaser of such medicine if the medicine contain an injurious substance instead of being purely vegetable as declared by the label, and such corporation

Note. — Liability of druggist for sale of misbranded medicine.

The provision of the Public Health Law relied upon by the defendant in the text case to save it from liability was as follows:

Public Health Law § 235, subd. 2. (Now amended by chap. 422, Laws 1910.)

“Every proprietor of a wholesale or retail drug store, pharmacy, or other place where drugs, medicines or chemicals are sold, shall be held responsible for the quality and strength of all drugs, chemicals or medicines sold or dispensed by him except those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines.”

It seems that the text case is the only one in which this portion of the old Public Health Law was involved, and if the case depended entirely on the statute it of course would not be used in these reports. The decision making, as it does, a firm of retail druggists liable as a manufacturer, because it held itself out as the manufacturer, is one which will have a tendency to do away with this practice of druggists. It will also

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cannot avail itself of the benefit of the exception contained in subdivision two of § 235 of the Public Health law, which, after declaring that every retail druggist shall be held responsible for the quality and strength of the drugs he sells, excepts "those sold in original packages of the manufacturer and those articles or preparations known as patent or proprietary medicines."

2. Druggist — Sale of poison — Cause of Action — Evidence of negligence — Necessity for.

Where the basis of an action is the sale of a poison to a person who called for a harmless drug, evidence of negligence is necessary in order to make out a cause of action.

3. Druggist — Liability — Sale of poison — Ordinary care — What constitutes.

The negligence which must be established to render a druggist liable for the sale of a poison to one who called for a harmless drug, is measured by his duty; and while this is only to exercise ordinary care, such care means the highest practicable degree of prudence, thoughtfulness and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business.

Liability of druggist for sale of misbranded medicine.—Continued.

have a tendency to make druggists more careful to ascertain, as far as possible, the contents of patent or proprietary medicines, as well as not to misrepresent the true character of any compound which they may sell.

Chapter 422 of the Laws of 1910 made a substantial and material change in the Public Health Law, relative to the practice of pharmacy.

That portion of the present law which is within the subject of this note is the last part of § 237 which is entitled "Adulterating, misbranding and substituting." The last part of the section reads as follows:

"Misbranding and substituting. A drug is misbranded if

1. The package bears any statement, design or device that is false or misleading in any particular regarding its contents, regarding the state, territory or county in which it is manufactured or produced.

2. It is an imitation or is offered for sale under the name of another substance.

3. The original contents of the package have been removed in whole or in part and other contents added.

4. The package fails to bear a statement of the percentage contained therein by volume of alcohol and by quantity or proportion of morphine,

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4. Druggists — Sale of harmful medicine — Action — Evidence of negligence.

In an action against a druggist to recover damages for selling *Kascara Kathartics*, a medicine containing an injurious substance, when a harmless drug was called for, negligence can be predicated of the action of the druggist's agent in selling the medicine upon the false representation that the druggist was the manufacturer, without having taken any other or further means to ascertain the true character of the compound than that it was similar to *Cascarets*, the composition of which was also unknown to the agent.

5. Druggists — Manufacturing druggist — Sale of injurious medicine — Liability.

Where the contents of a medicine are concealed from the public generally and the manufacturer knows the contents and sells the medicine recommending its use for indicated maladies and prescribing the mode in which it shall be taken and an injury is thereby caused to a purchaser thereof, the manufacturer is liable to such purchaser for the injury which he has suffered.

Appeal from a judgment of the Appellate Division, Fourth Department.

Liability of druggist for sale of misbranded medicine.—Continued.

opium, heroin, chloroform, cannabis indica, chloral hydrate, acetanilide or any derivative or preparation of any of these substances.

5. The package containing a homeopathic drug fails to state that fact.

These statements shall be made in type easily read, conspicuously displayed and described by their common or English names. Alcohol used as a solvent, preservative or for any other purpose is contained in the drug within the meaning of this article. Nothing in this paragraph applies to the compounding and dispensing of drugs and medicines on the written prescription of a physician, dentist or veterinarian, which prescription shall be kept on file by the pharmacist or druggist. Nor does it apply to unadulterated drugs recognized in the pharmacopocia and the formulary and the homeopathic pharmacopocia sold under the names by which they are recognized therein, and not sold under a proprietary name, trade name or trade mark. All adulterated, misbranded or substituted drugs are forfeited to the board of destruction."

For a note on "Negligence of Druggists" see 16 N. Y. Ann. Cas. 267.

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Willson v. Faxon, Williams & Faxon.

Action by Fannie E. Willson, purchaser, against Faxon, Williams & Faxon, druggists, to recover damages for defendants' negligence in selling an injurious medicine for a harmless one.

Charles Newton, of Buffalo, for plaintiff-appellant.

Carlton E. Ladd, of Buffalo, for defendant-respondent.

WILLARD BARTLETT, J. This case has been tried twice. Upon the first trial the plaintiff was successful, but the judgment entered upon the verdict in her favor was reversed by the Appellate Division, and upon the second trial, the evidence being the same, a verdict was directed in favor of the defendant. From the judgment upon that verdict the plaintiff now appeals.

The defendant is a domestic corporation engaged in selling drugs and medicines in the city of Buffalo. The plaintiff purchased at its store a box of medicinal pills labeled as follows:

"Price 25 cents

"Kascara

"Kathartics

"Cure Constipation

"Faxon, Williams and Faxon, Mfg.

"Druggists, Buffalo, N. Y."

(On the reverse side):

"DIRECTIONS.

"Kascara Kathartics can be taken at any time. As a laxative, EAT one tablet. For constipation, a tablet at bed time, and one before breakfast will prove satisfactory. In obstinate

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cases continue this treatment until cured. Children, one-quarter to one-half tablet, according to age."

(On one side of the box):

"Stimulate the Liver,
"Invigorate the Bowels."

(On the reverse side):

"Purely vegetable,
"Pleasantly effective."

The plaintiff testified, and in this she was corroborated by her husband, that the defendant's clerk from whom she purchased the box of tablets informed her that the preparation was the same as cascara sagrada only in tablet form. She made use of the tablets, taking them as she had been accustomed to take cascara sagrada for the purpose of a laxative; but the consequences were very different from those produced by that medicine. The plaintiff developed a case of mercurial salivation, and an examination of the tablet proved that each tablet contained one-fifth of a grain of calomel combined with senna and podophyllin.

In behalf of the defendant it was proved that the tablets known as Kascara Kathartics were manufactured by Billings, Clapp & Company, wholesale druggists of Boston, Massachusetts, well known to the trade as reputable manufacturers of high grade patent and proprietary medicines; that the defendant purchased the tablets in question from these manufacturers, the goods being put up by them at the manufactory with the special label of the defendant printed thereon; and that Kascara Kathartics had been upon the market for about ten years. The quantities sold ranged from 500 to 1000 pounds a year. From March, 1903, up to the time of the first trial in May, 1909, the defendant had sold about 900 boxes without complaint from any of its customers. It was stipulated that Kas-

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cara Kathartics was a patent or proprietary medicine and it appeared that it was not the custom of retail druggists to analyze proprietary medicines.

The Appellate Division held that the proof utterly failed to establish the negligence of the defendant because it did not know that the tablets sold to the plaintiff were dangerous and having purchased them of a long-established manufacturing concern of excellent reputation it was justified in placing reliance upon its vendor. The Appellate Division also seems to have been of the opinion that the defendant was protected by the following provision of the Public Health Law (Cons. Laws ch. 45, § 235, subd. 2: "Every proprietor of a wholesale or retail drug store, pharmacy, or other place where drugs, medicines or chemicals are sold, shall be held responsible for the quality and strength of all drugs, chemicals or medicines sold or dispensed by him *except those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines.*

Where the contents of a medicine are concealed from the public generally and the manufacturer knows the contents and sells the medicine recommending its use for indicated maladies and prescribing the mode in which it shall be taken and an injury is thereby caused to a purchaser thereof, the manufacturer is liable to such purchaser for the injury which he has suffered. (*Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612). In the case cited it was said that the purchaser "has a right to rely upon the statement or recommendation of the proprietor printed and published to the world; and if thus relying he takes a medicine and is injured on account of some concealed drug of which he is unaware the proprietor is not free from fault and is liable for the injury thereby sustained." The liability under these circumstances grows out of the misleading concealment of a material fact, as of the composition of a medicine which the manufacturer knows or ought to know and the accompanying representation to the purchaser that he may use the preparation with safety.

In the case at bar, however, we have to deal with a sale made

not by the actual manufacturer but by a corporation of retail druggists which purchased the medicine in large lots from the actual manufacturer. It being agreed that the compound sold was a patent or proprietary medicine, the corporation seeks to shield itself behind the exception in subdivision 2 of section 235 (formerly section 197) of the Public Health Law, already quoted, which, after declaring that every retail druggist shall be held responsible for the quality and strength of the drugs which he sells, excepts "those sold in original packages of the manufacturer and those articles or preparations known as patent or proprietary medicines."

Is the benefit of this exception available to a retail druggist who holds himself out to a purchaser as the actual manufacturer of the medicine sold? I think not.

It is plain that if the sale had been made by the manufacturers themselves, Billings, Clapp & Co., of Boston, the fact that Kascara Kathartics were comprehended within the class of patent or proprietary medicines would not in any wise have absolved Billings, Clapp & Co. from responsibility for the strength and quality which of course includes the character of the compound. I think that when the defendant represented to the plaintiff by means of the statement contained in the label on the box that Faxon, Williams & Faxon, were the manufacturers of the preparation is rendered itself just as liable to the purchaser as the actual manufacturers would have been if the purchase had been made from them. In other words, the defendant, by reason of this representation, became responsible to the plaintiff for the strength and quality of the preparation notwithstanding its patented or proprietary character; and, if the compound contained an injurious substance instead of being purely vegetable as the label declared the defendant became liable in law for the injury suffered by the purchaser in consequence of ignorantly taking the concealed poison.

The case is not at all like *Thomas v. Winchester* (6 N. Y. 397) or *Torgesen v. Schultz* (192 N. Y. 156), where the suits were by third parties against the original manufacturer. Here the action is by a purchaser against the immediate vendor; and

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it is with the duties and obligations of such vendor that we are concerned. The basis of the action is the sale of a poison to a person who called for a harmless drug; and the law is well settled that in such a case evidence of negligence is necessary in order to make out a cause of action. Mere proof of the mistakes is not enough in and of itself to charge the vendor with liability. (*Allan v. State Steamship Co.*, 132 N. Y. 91; *Brown v. Marshall*, 47 Mich. 576.) The negligence which must be established to render a druggist liable in such a case as this is measured by his duty; and while this is only to exercise ordinary care the phrase ordinary care in reference to the business of a druggist must be held to signify "the highest practicable degree of prudence, thoughtfulness and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicines." (*Tremblay v. Kimball*, 107 Maine, 53.) Within this rule, however, I think there was sufficient evidence of negligence to take the case to the jury. The defendant although representing itself to be the manufacturer, and, therefore, presumably acquainted with all the ingredients going to make up the medical preparation which it sold to the plaintiff, really knew nothing about the nature of the compound save what one of its agents had learned from *Billings, Clapp & Co.*, to the effect that *Kascara Kathartics* were similar to *Cascarets*, and this witness admitted that he did not know what *Cascarets* contained. I think negligence could be predicated of the action of the agent of the defendant corporation in selling this medicine upon the representation that it was the manufacturer, without having taken any other or further means to ascertain the true character of the compound. If it could justify itself under the exception in the Public Health Law, already mentioned, it could escape liability even if the box of tablets had contained some deadly drug which had killed Mrs. Willson as soon as she took it. A construction of the statute which could lead to such results is hardly worthy of serious consideration.

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If I am right in the views which have been expressed the judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, WERNER, CHASE and HOGAN, JJ., concur; COLLIN, J., dissents.

Judgment reversed, etc.

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Simon v. Bierbauer.

(*Supreme Court, Appellate Division, First Department, January, 1913.*)

SIMON, Respondent, v. BIERBAUER, Appellant.

(*154 App. Div. 506, 139 N. Y. Supp. 327.*)

1. Action — Splitting cause of action.

Where several sums or instalments are due upon a single contract, they must all be united in one action, the plaintiff cannot split up the cause of action by suing for some instalments and reserving others which are already due for future action.

2. Motion for judgment — Adversary's pleading deemed to be true.

For the purpose of a motion made by the plaintiff for judgment on the pleadings, the allegations of defendant's answer must be accepted as true.

3. Judgment — By default — Effect on counterclaim.

The dismissal of defendant's counterclaim on rendering judgment for the plaintiff on defendant's default does not thereafter prevent the defendant from recovering on it.

Appeal from an order of Special Term, New York County.

Note. — Splitting causes of action.

a. In general, 190.

b. Arising upon contract, 196.

1. *For goods sold on specified term of credit, 196.*

2. *Where breach of entire contract is total, 197.*

3. *For compensation for services, 198.*

4. *Where running account exists, 199.*

5. *Containing separate and distinct stipulations or covenants, 201.*

6. *For rent under lease, 201.*

7. *Instalment contracts, 203.*

c. Arising out of tort, 203.

d. Rule in equity, 204.

e. Waiver of rule against splitting of cause of action, 204.

Action by Nathan Simon against Bruno W. Bierbauer to recover for goods sold and delivered.

Joseph A. Burdeau, of Brooklyn, for defendant-appellant.

David L. Podell, of New York City, for plaintiff-respondent.

McLAUGHLIN, J. The complaint alleges that on December 21, 1909, the Edinborough Publishing Company, plaintiff's assignor, entered into a contract with the defendant, by which it sold and delivered to him a set of books at the agreed price of \$2,400, of which \$130 was paid upon delivery, and the balance agreed to be paid in installments of \$130 each on

Splitting causes of action.—Continued.

a. In general.

The law will not permit a party who has recovered in one action a portion of an entire demand, to make the residue of it the subject of another suit.

Bancroft v. Winspear, 44 Barb. 209.

Guernsey v. Carver, 8 Wend. 492.

Bendernagle v. Cocks, 19 Wend. 207.

Fish v. Folley, 6 Hill, 54.

Beach v. Crain, 2 N. Y. 86.

An entire claim, arising either upon contract or from a wrong, cannot be divided, and made the subject of several suits, and, if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits of either will be available as a bar in the other suits.

Secor v. Sturgis, 16 N. Y. 548.

Guernsey v. Carver, 8 Wend. 492, 24 Am. Dec. 60.

Smith v. Dittenhoefer, 1 City Ct. R. 143.

Jex v. Jacob, 7 Abb. N. C. 452.

Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L.R.A. 113.

Several suits may, however, be maintained upon several causes of action, though they might be united in a single suit. *Fox v. Phyfe* (36 Misc. 207, 73 N. Y. Supp. 149). In that case an attorney sued to recover

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the 1st day of each succeeding month, until the whole sum should be paid; that the installments due on the 1st of January and February, 1910, were paid, but those for the four succeeding months were not; that plaintiff, on June 14, 1910, brought an action in the City Court of the city of New York to recover a judgment for such installments; that it had a recovery, and the judgment has since been paid. The present action is brought to recover the balance of the installments, viz.: \$1,490, with interest. Annexed to and made a part of the complaint are the pleadings in the action in the City Court, including the contract there sued on. The answer of the defendant in the City Court, besides denying certain allegations of the complaint, set up facts by way of defense and as a counterclaim for damages alleged to have been sustained, for which judgment

Splitting causes of action.—Continued.

\$100 for services rendered, having previously sued and recovered \$435.93. It was contended that the former action was a bar, but the court held that, as the services collected for in the first suit were rendered in connection with a certain controversy, and such services were expressly excepted from those sued for in the second suit, the attorney could recover in the second suit.

The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts.

Secor v. Sturgis, 16 N. Y. 548.

Where items of an account arise at different times, there must be an express contract, or else the circumstances must be such as to raise an implied contract, embracing all the items which may result in a single or entire demand or cause of action, within the rule against splitting a cause of action.

Gentles v. Finck, 23 Misc. 153, 50 N. Y. Supp. 726.

Only one action may be maintained for one cause of action in its entirety, and the judgment therein is *res adjudicata* of all parts of such cause of action whether included in the complaint or omitted, including all incidental relief prayed for in the complaint specifically or by being

was demanded. A reply was served in that action, which put in issue all of the allegations of the counterclaim. The defendant did not appear at the trial in the City Court action, and the plaintiff took judgment for the amount demanded.

In the present case the defendant interposed an answer, in which he admitted the recovery of the judgment in the City Court, and alleged: That the contract, as pleaded in the complaint, was not the one entered into between the parties. That the contract contained a provision:

"That in case defendant failed to meet any payment within sixty days after the same became due, said failure would cause the total unpaid balance of the full price of said set of books to become due and payable."

Splitting causes of action.—Continued.

embraced in the general prayer, or which might have been prayed for in the complaint and given by judgment.

Maasch v. Grauer, 123 App. Div. 669, 108 N. Y. Supp. 54.

Interest cannot be separated from the principal so as to permit an action to be prosecuted for it alone.

Clement v. Grant, 2 City Ct. R. 438.

Where a man loses money at three different sittings in a faro game he may bring separate actions for his losses on each occasion

Betts v. Hillman, 15 Abb. Pr. 184.

A joint cause of action, vested in two or more, cannot be split into several at the option of those in whom it is vested. *Coster v. The N. Y. & Erie R. R. Co.* (13 N. Y. Supp. Ct. [6 Duer] 43). In that case a steamboat was owned by four persons, who by a single contract let the boat to the defendants. The court held that two of such persons could not bring a separate action to recover their portion of the rent of such boat.

In *Secor v. Sturges*, supra, the court says: "It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions."

In *Nathans v. Hope* (77 N. Y. 420), it appeared that three notes were given upon the settlement of a single indebtedness. Subsequently three

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And that the recovery of the judgment in the City Court, all of the installments under the contract being due, was a bar to the recovery of the installments here sued on. The answer also set up, by way of counter claim, substantially the same facts that were pleaded as a counterclaim in the City Court action. After issue had been joined, the plaintiff moved for judgment on the pleadings on the ground that the judgment rendered in the City Court action settled in his favor all of the issues sought to be raised by the defendant. The motion was granted, and defendant appeals.

I think the court erred in granting the judgment. If the contract between the defendant and plaintiff's assignor was as is claimed by the defendant—and for the purposes of the mo-

Splitting causes of action.—Continued.

others were given to take up the first three, and plaintiff brought suit on two of these notes separately. Judgment having been rendered and satisfied in the first action, the defendant set it up as a bar in the present action. The court in holding that it was no bar said: "The principle is well settled that an entire indivisible demand cannot be split up into several claims, so as to make it the subject of two or more separate actions. * * * But this rule does not interfere with the prosecution of separate suits for distinct causes of action, which are not connected with each other and do not constitute an entire claim. Hence, it follows that there is no rule of law or principle which prevents the prosecution of several promissory notes in separate and distinct actions; and the holder may maintain an action separately on each note. The same rule applies to separate trespasses. A separate suit may be brought for each one of them; and all demands which arise upon a separate and distinct transaction may be prosecuted separately. * * * In the case at bar, the note on which the action was brought was one of three given to take up three other notes which were given upon the settlement of an indebtedness to the amount thereof; but this fact did not make each of them a part of the original demand, so as to compel the plaintiff to bring a single action for all the notes. The notes given for the original indebtedness were a settlement of that, to the extent of making each one a separate and distinct cause of action and there is no principle or authority which sustains the doctrine that a party holding such notes cannot pursue a separate remedy, and maintain a distinct action upon each of them. If an action was brought on the old notes, originally given by the defend-

tion it had to be accepted as true—then all of the installments, at the time the action was commenced in the City Court, were due, and the plaintiff had to recover all of them, if at all. He could not recover four installments and thereafter bring another action to recover the others; and this under the well-settled rule that a plaintiff cannot split up an existing cause of action by suing for some installments and reversing for future action others, which are already due. *Kennedy v. City of New York*, 196 N. Y. 19, 89 N. E. 360, 25 L.R.A.(N.S.) 847; *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L.R.A.(N.S.) 1042, 112 Am. St. Rep. 601, 6 Ann. Cas. 60; *Secor v. Sturgis*, 16 N. Y. 548; *Goldberg v. Eastern Brewing Co.*, 136 App. Div. 692, 121 N. Y. Supp. 465. Here was an issue which had to be disposed of upon the trial, and it could not be sum-

Splitting causes of action.—Continued.

ant, it would be a defense to such action, that the new notes had been given in the place of the former, and that they had in that manner been paid. The authorities cited to sustain the position that the notes given were not a payment, and did not extinguish the debt, have no application where the original demand is divided into different parts by separate notes, as was the fact here."

Section 50 and 51 of the Civil Rights Law (Ch. 132, Laws 1903), declared it to be a misdemeanor to use for advertising purposes or purposes of trade the name, portrait, or picture of any living person without having first obtained his consent in writing thereto, or, if a minor, the consent of his parent or guardian, and that such use might be enjoined and that damages therefor might be recovered, and, further, that, if the name, portrait, or picture shall have been knowingly so used, exemplary damages might be awarded in the discretion of the jury. *Binns v. Vitagraph Co. of America* (147 App. Div. 783, 132 N. Y. Supp. 237), was an action brought under this statute for an injunction and to recover damages. The court held that damages could not be given in one action for a violation of the rights protected by the statute and in another for the libel based on the same acts, but that only one recovery can be had in the premises.

Where the amount of a promissory note forming one indivisible contract is too great to permit suit in a justice's court the same cannot

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Simon v. Bierbauer.

marily disposed of on a motion for judgment on the pleadings. Emanuel v. Walter, 138 App. Div. 818, 123 N. Y. Supp. 491.

I am also of the opinion that the counterclaim which had been put in issue by a reply had to be disposed of before judgment could be granted. While the facts upon which it is predicated are substantially the same as those pleaded in the City Court, that judgment did not dispose of it since the defendant defaulted at the trial. Defendant's default does not of course, render the former judgment less conclusive as to all matters which were necessarily determined in awarding plaintiff judgment (Brown v. Mayor, 66 N. Y. 390; Reich v. Cochran, 151 N. Y. 122, 45 N. E. 367, 37 L.R.A. 805, 56 Am. St. Rep. 607); but there was no investigation upon the merits of the counterclaim. That was simply dismissed, and such dismissal

Splitting causes of action.—Continued.

be split into several suits for smaller amounts in order to give the justice jurisdiction.

Willard v. Sperry, 16 Johns. 121.

Where a charge is made for trunks containing merchandise in addition to the amount paid for a railroad ticket entitling the holder to carry baggage, a separate suit may be brought to recover for the loss of the merchandise trunks after a recovery has been had for loss of baggage.

Millard v. Missouri, Kansas & Texas R. R. Co., 86 N. Y. 441.

The holder of one-fifth interest in a note by assignment from the payee therein cannot bring a separate suit to recover his one-fifth interest in the note, as the obligation of the maker of the note is single.

King v. King, 73 App. Div. 547, 77 N. Y. Supp. 40.

Where a judgment creditor has prevailed in her action against the fraudulent grantee to set aside a conveyance of real property by the judgment debtor of real property by the judgment debtor as in fraud of creditors, she cannot maintain another action to make the fraudulent grantee account for the rents and profits thereof received by him in such grantee, as the cause of action was entire.

Maasch v. Graner, 123 App. Div. 669, 108 N. Y. Supp. 54.

Where a party by separate and distinct assignments, made at different times, acquires title to certain royalties due at different times, he may

did not, in and of itself, thereafter prevent defendant from recovering upon it. *Honsinger v. Union Carriage & Gear Co.*, 175 N. Y. 229, 67 N. E. 436; *Knickerbocker Trust Co. v. C. C. & R. S. R. Co.*, 188 N. Y. 38, 80 N. E. 568; *Barber v. Ellingwood*, 137 App. Div. 704, 122 N. Y. Supp. 369. It was in effect a nonsuit.

Upon both grounds, therefore, I think the motion for judgment on the pleadings should have been denied.

It follows the order appealed from is reversed, with \$10 costs and disbursements, and the motion for judgment denied, with \$10 costs.

All concur.

Splitting causes of action.—Continued.

maintain separate suits to recover for such royalties and a judgment in one suit is not a bar to the second although both instalments were due at the time the first suit was instituted.

Miller v. Union Switch & Signal Co. 13 N. Y. Supp. 711, 59 Hun, 624.

b. Arising upon contract.

1. For goods sold on specified term of credit.

Zimmerman v. Ehrard (83 N. Y. 74), was an action to recover for goods sold on credit at different dates. The defendant set up the pendency of another action for the same cause of action. The former case was brought to recover the value of goods sold at a date prior to those for the recovery of the value of which the above was brought; and the proof showed that they were all sold upon a contract for a credit of four months. The court said: "Under this state of facts each sale was separate and distinct, and a cause of action accrued when the time of credit expired and as the several amounts became due. The different sales and did not constitute one entire and indivisible demand, and the plaintiffs could bring separate actions for each separate sale, or for all of them together as they saw fit. The different demands were like several promissory notes or several distinct trespasses, and in the nature of separate and distinct transactions, for each of which a separate action might be brought. The rendering of an account containing all the items does not change the nature of the contract or evince that the transactions were

Splitting causes of action.—Continued.

not separate and distinct. The cases cited to sustain the rule that the account sued upon was entire and could not be split up so as to form the basis of separate causes of action, are only applicable where successive suits are brought for separate items of a current account or for separate installments becoming due under the same contract, and are not analogous to the facts presented in the case at bar."

Where a bill of goods is sold on a certain date on six months' credit and on another date a bill is sold without credit, they are separate and distinct demands and may be sued upon in separate actions.

Staples v. Goodrich, 21 Barb. 317.

Where there are two sales of a distinct quantity of goods upon a specified credit of six months, expiring at different dates, each sale constitutes a separate demand or transaction and is the subject of a separate suit.

Cashman v. Bean, 3 Hilt. 340.

The *Reformed Protestant Dutch Church of Westfield v. Brown* (54 Barb. 191), was an action brought to recover several yearly subscriptions, due and unpaid, upon a certain instrument. The court however held that the action was barred by the recovery of a judgment in a former action brought to recover the first installment only, at a time when the other installments were due.

Where goods are sold to be paid for, one-half within ten days and the balance within sixty days, an action brought to recover the one-half due within ten days, if brought before the expiration of the sixty days is not subject to the defense of splitting causes of action.

Ikonograph Co. v. John Newton Porter Co., 113 N. Y. Supp. 537.

2. Where breach of entire contract is total.

The evidence in *Fish v. Folley* (6 Hill, 54), showed that the defendant's intestate in 1822 covenanted with the plaintiff to furnish him a continued supply of water for his mills. There was a total breach of this covenant since 1826. A recovery was had for damages arising therefrom in 1835. The above action was brought to recover for failure to perform from 1835. The court in holding that the former recovery was a bar to the above suit, said: "It is true, the covenant stipulated for a continued supply of water to the plaintiff's mills; and in this respect it may be appropriately styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent or should have obtained it in the former suit. To allow a recovery again, would be splitting up an entire cause of action, in violation of established principles.

Splitting causes of action.—Continued.

Coggins v. Bulwinkle (1 E. D. Smith, 434), was an action brought for the breach of a contract after recovering in a prior action for a similar breach of the same contract, the breaches all occurring at the same time. The contract in question was as follows: "Bark *Esther Francis*.—Received, New York, June 6, 1847, of Coggins, agent, ninety-six dollars, as advance wages for T. Zender, H. Burner, I. Duffy, and Wm. Dixon, who have shipped as seamen of barque *Esther Francis*, and I hereby become security that they shall render themselves on board of said vessel on or before this day, prepared for sea and fit for duty, and that they shall continue on board and proceed to sea in said vessel, or in default of either of the above stipulations, I promise to refund said advance wages, with damages, in such case made and provided.

Signed, H. Bulwinkle."

The four seamen named in the agreement, all left the vessel together, without going to sea and before any suit was brought. Thereupon the plaintiff brought suit upon this agreement, alleging, as a breach of the agreement, the default of William Dixon to go to sea according to its provisions, and he recovered therein \$48, for advance wages and damages, which was paid. The plaintiff then brought three other suits upon the same agreement (of which this suit is one) alleging as a ground of claim in the suits respectively, the separate default of one of the other seamen named in the agreement.

On appeal the court, in reversing the judgment below, said: "The breach of the agreement entered into by the defendant, consisted in the neglect or refusal of the seamen to render themselves on board the vessel, and proceed to sea according to the stipulation. For this the plaintiff was entitled to bring an action upon it, and recover back the ninety six dollars advanced, together with his damages, and he could maintain but one action, unless, after he had commenced his suit, a new cause of action arose by a further breach. He has brought his action, and recovered judgment in it; and having failed to recover all that he was entitled to, he is now remediless."

3. For compensation for services.

The plaintiff in *Howard v. Hunter* (50 Misc. 576, 99 N. Y. Supp. 542), entered into a contract with the defendant to "sell and offer for sale" automobile tops to be manufactured by the defendant. Plaintiff's compensation was fixed as "all sums of money he could obtain over and above" certain prices fixed by the defendant for different kinds of tops. The plaintiff brought two actions, one to recover for services in selling one kind of tops to one concern and the other to recover for services in selling a different top to another concern. The court held that the contract was entire and could not be split up in this way.

Splitting causes of action.—Continued.

In *Gardner v. Patten* (15 N. Y. Supp. 324), it appears that plaintiff's assignor worked for the defendant during three months under an agreement that he should be paid at the end of each month. He recovered for the first two months work and assigned his claim for the third month to the plaintiff. The trial court found that the work sued for was done "under the same agreement as to payment," but not that it was under the same agreement as to work, and that it was "other work." The court therefore held that the separate action could be maintained.

The plaintiff in *Perry v. Dickerson* (85 N. Y. 345), had recovered damages for being wrongfully dismissed from the defendant's employment in violation of their contract to employ him for a year. The defendants set up this recovery as a bar to the action brought for wages stipulated to be paid by the contract, which were earned and due at the time of the wrongful dismissal. The court held that these were separate demands and that the former recovery was no bar.

4. Where running account exists.

Bendernagle v. Cocks (19 Wend. 207), was an action brought for breaches of distinct covenants to pay for manure and for work and labor, contained in an indenture of lease. There was an action pending to recover for the breach by the defendant of certain other covenants in the lease. The court in holding that the different breaches constituted but a single cause of action, said: "Looking, as I think we must, on the several defaults to pay items, as so many successive breaches of a single contract, we have an authority for saying that all such breaches are but parts of one indivisible demand, so far as they were committed at the commencement of the suit."

In *Guernsey v. Carver* (8 Wend. 492), it was held that all the items due on a running account for merchandise sold, constituted but one demand, and that a recovery in one action for a part of the items, was a bar to a subsequent action for the residue. Mr. Justice Nelson, after stating that it was settled in that court that if a plaintiff bring an action for part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for another part of the same demand, says: "This case comes within the reason and spirit of that principle. The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors multiplicity of suits. According to the doctrine of the court below, a suit might be sustained, after the whole became due, on each separate item delivered, and if any division of the account is allowable it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon

Splitting causes of action.—Continued.

debtors, and be an unjust reproach upon the law. The only just and safe rule is to compel the plaintiff, on an account like the present, to include the whole of it due in a single suit."

In commenting on the above opinion, the court, in *Secor v. Sturgis* (16 N. Y. 548), says: "The reasoning of the learned justice would make every account consisting of different items, the whole of which is due, an entire demand incapable of division for the purpose of prosecution irrespective of every other consideration. It excludes the idea that it is necessary the claims should have arisen out of a single transaction, or be connected together by contract." And the court in *Secor v. Sturgis* further says: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work; or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action."

In the *Secor* case it appears that the business of ship-carpenters was carried on in one part of a building, under the direction of two of the partners of a firm, and the business of ship-chandlers in another part of the same building, under the direction of the third partner. Separate books of account were kept by different clerks in the two branches of busi-

Splitting causes of action.—Continued.

ness, and the partners confined themselves respectively to the management of one of the branches, without personally taking part in the other. Work was done and materials furnished from the carpentry branch in repairing and equipping a brig, upon the order of her captain, to the amount of \$139, and immediately thereafter goods and articles of ship-chandlery were furnished to the same brig, and on the order of the same captain at different times through the period of a month, amounting to \$521. It was held that the accounts did not constitute an entire claim, but on the contrary, formed two several causes of action. The court says: "It is very clear that the two accounts did not constitute an entire claim; but on the contrary, that they were several and formed two several causes of action. The business of the plaintiffs consisted of two branches, were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into under which one of the accounts arose anterior to the opening of the other account. Here was no express contract connecting the two accounts; and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended."

The court in *Stevens v. Lockwood* (13 Wend. 644), followed the decision in *Guernsey v. Carver*, *supra*, as the case presented a continuous and indivisible account.

5. Containing separate and distinct stipulations or covenants.

Goldberg v. Eastern Brewing Co. (136 App. Div. 692, 121 N. Y. Supp. 465), was an action brought for the breach of a covenant in a lease that the lessee would make all repairs necessitated by wear and tear during the term, and at the expiration thereof would quit and surrender the premises in as good state and condition as reasonable use and wear would permit. The court held that a judgment in a former action to recover rent under the lease was a bar, as the breaches of the different covenants in the lease constituted one cause of action.

6. For rent under lease.

Judge McAdam states the facts in *Smith v. Dittenhoefer* (1 City Ct. R. 143), as follows: "The plaintiff brought three actions against the defendant to recover rent due upon the same indenture of lease. The three actions are designated, for convenience of reference, as numbers 3, 4 and 5. They were commenced on the same day (i. e. October 3, 1878)—Action No. 3, to recover \$275 rent for July, 1878; Action No. 4, to recover \$275 rent for August, 1878; and action No. 5, to recover \$275 rent for September, 1878. Action No. 3 was not defended, and judgment was allowed

Splitting causes of action.—Continued.

to go by default, October 14, 1878. This judgment was shortly afterwards paid and satisfied. The present actions, 4 and 5, were and are defended upon the plea that the pendency of action No. 3, and the judgment therein, and payment thereof, were, under the circumstances, a bar to actions 4 and 5." The court further says: "The law is well settled that where a party has several demands, or existing causes of action, growing out of the same contract, and which may be joined or sued for in the same action, they must be joined, and if the demand and causes of action be split up and a suit brought for part only, and subsequently a second suit for the residue, the first action may be pleaded in abatement or bar of the second action, * * * The several claims involved in actions 3, 4 and 5, having arisen under the same indenture of lease, and being all due and payable at the time said actions were commenced, constituted one entire indivisible demand or cause of action; and the plaintiff having wrongfully split said demand into three parts, so as to bring separate actions thereon, the pendency of action No. 3 was a good defense in actions 4 and 5, by way of plea in abatement, and after judgment therein, by way of plea in bar. The defense, although purely technical, is founded upon the above well-established rule, which, although severe in its application to some cases, was found necessary to prevent useless vexation, annoyance and expense to litigants by a multiplicity of actions upon past due claims under the same contract, which properly form the subject of but one action. The rule is applicable to the present actions 4 and 5, and entitles the defendant to judgment."

Jex v. Jacob (19 Hun, 105, 7 Abb. N. C. 452), was an action brought to recover \$6,615 for two quarters rent accruing on a lease executed by the parties. At the time when this suit was commenced other rent had become due to the plaintiff on the same covenant, for the preceding occupancy by the defendants of the same premises for the recovery of the balance of which an action was subsequently brought. Judgment by default was recovered in that action, which was afterwards satisfied by payment. The court held that the recovery in the second action for such balance, amounting to \$150 and costs created a legal defense to the suit for the \$6,615, as both demands were due when this action was commenced, and accrued for distinct failures to perform the same covenant.

Where a tenant under a written lease holds over from year to year after the expiration of the term of the lease, such holding over constitutes a new term for each year that it continues, and a recovery for the balance of rent due in one year will not bar a separate action to recover for rent due for subsequent years, although such rent was due at the time of the first recovery.

Kennedy v. City of New York, 196 N. Y. 19, 89 N. E. 360.

*Splitting causes of action.—Continued.**7. Installment contracts.*

An action upon an instrument payable by installments may be brought for each installment as it becomes due, but the action must embrace all which are due when the action is commenced.

Underhill v. Collins, 60 Hun, 585, 15 N. Y. Supp. 495.

The defendants in *Pakas v. Hollingshead* (184 N. Y. 211, 77 N. E. 40), contracted to deliver to the plaintiff fifty thousand pairs of bicycle pedals to be delivered in installments. After delivering part of the first installment they refused to deliver any more; and when the first installment was all due the plaintiff sued and recovered damages for the defendant's breach of the contract in failing to deliver the balance of the first installment. Subsequently this action was commenced to recover damages for the failure to deliver the balance of the goods. The court held that the former recovery was a bar as the refusal to deliver was a breach of the entire contract, and constituted one demand or cause of action which could not be split up to recover for the separate installment breaches.

c. Arising out of tort.

Where there is a conversion or tortious taking under an attachment of a bed and the bed-quilts which then lay on the bed, such seizure is a single indivisible act, and separate suits cannot be brought for each article.

Farrington v. Payne, 15 Johns. 432.

Two separate actions for libel cannot be brought on the single publication of an article. A republication of the same article in a later edition of the same paper does not alter the case.

Galligan v. Sun Printing and Publishing Association, 25 Misc. 355, 54 N. Y. Supp. 471, 28 N. Y. Civ. Proc. Rep. 349.

Filer v. New York Central R. R. Co. (49 N. Y. 42), was an action brought by the plaintiff to recover for injuries sustained by his wife while a passenger of the defendant. The court held that successive actions could not be brought by the plaintiff for the recovery of damages, as they might accrue from time to time, resulting from the injury complained of. To quote: "The action is for a single wrong, the injury resulting from a single act, and the plaintiff was entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages; that is compensation for all damages resulting from the injury, whether present or prospective."

A recovery in an action for malicious prosecution is a bar to a subsequent action for slander for the same cause.

Sheldon v. Carpenter, 4 N. Y. 579.

*Splitting causes of action.—Continued.**d. Rule in equity.*

The assignee of part of a claim may maintain an action in equity to enforce the same.

Field v. Mayor, etc. of New York, 6 N. Y. 179, 57 Am. Dec. 435.

Risley v. Phenix Bank of New York, 83 N. Y. 318, 38 Am. Rep. 421.

Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707.

Dickinson v. Tyson, 125 App. Div. 735, 110 N. Y. Supp. 269.

In the Risley Case (*supra*), the court says: "The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation, has much less force under a system which requires all parties in interest to be joined as parties to the action."

In Fireston v. Ætna Indemnity Co. (67 Misc. 443, 123 N. Y. Supp. 107), the court states that the defendant in replevin has undertaken to assign to the plaintiff "all my right, title, and interest, in and to a certain undertaking in replevin, * * * together with full right to institute any and all actions for the recovery of damages by me sustained under said undertaking in replevin to the extent of two hundred and fifty dollars." The cause of action cannot be split up in this manner, and recovery had in an action, unless all claimants are joined therein."

e. Waiver of rule against splitting of cause of action.

Mr. Justice Smith in *Mills v. Garrison* (3 Keyes, 40), in speaking of the rule that a single claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits, says: "It is competent for the debtor to waive the protection of the rule; and no more complete waiver can be suggested than an agreement by the debtor, that if the creditor will forbear suing upon the whole demand, and will sue upon a part of it, then in case he recovers, the defendant will pay the balance of the claim."

Although, as a general rule, a demand due to several persons jointly, cannot be subdivided so as to allow the individual interests to be recovered in separate actions, yet it may be done with the debtor's consent.

Carrington v. Crocker, 37 N. Y. 336, 4 Abb. Pr. (N. S.) 335.

People v. Harris.

(Court of Appeals, June, 1913.)

PEOPLE, Respondent v. HARRIS, Appellant.

(209 N. Y. 70, 102 N. E. 546. Rev'g judgment of Supreme Court, Wyoming County.)

1. Homicide — First degree murder — Premeditation and deliberation — Time required for.

Where six attempts are made to discharge a revolver into the body of another, the time which must elapse between the first and the sixth effort is a sufficient period within which deliberation is possible.

2. Homicide — Motive — Evidence.

On the trial of a man charged with the murder of his wife, evidence of mere temporary intimacy with a prostitute is inadmissible for

Note. — Time required for premeditation and deliberation in homicide cases.

It is not necessary to constitute murder in the first degree that a person should deliberate and premeditate upon his design to effect the death of another for any specified period of time.

People v. Koenig, 180 N. Y. 155, 72 N. E. 993.

People v. Clark, 7 N. Y. 385, 2 Edm. Sel. Cas. 294.

People v. Conroy, 97 N. Y. 62, 2 N. Y. Crim. R. 565.

People v. Ferraro, 161 N. Y. 365, 55 N. E. 931.

People v. Hawkins, 109 N. Y. 408, 17 N. E. 371.

People v. Constantino, 153 N. Y. 24, 47 N. E. 37.

People v. Decker, 157 N. Y. 186, 51 N. E. 1018.

People v. Governale, 193 N. Y. 581, 86 N. E. 554.

People v. Boggiano, 179 N. Y. 267, 72 N. E. 101.

It is sufficient if the deliberation precedes the act, that is, to constitute murder in the first degree, there must be a deliberate design to effect death, and such deliberation must precede the act.

People v. Koenig, 180 N. Y. 155, 72 N. E. 993.

People v. Schmidt, 168 N. Y. 568, 61 N. E. 907.

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the purpose of establishing the absence of affection for the wife and a motive for getting rid of her, particularly where such intimacy has existed at a time when the husband and wife are voluntarily living apart.

3. Criminal Law — Attempt to escape — Evidence.

The mere participation of a new prisoner in the fashioning of a possible instrument of escape which previous inmates of the jail had begun to construct before his advent, cannot be regarded as evidence of the guilt of such new prisoner within the rule which permits an inference of guilt from an attempt to escape arrest or incarceration.

4. Criminal Law — Evidence — Admissibility.

Where, on the trial of a man charged with murder in the first degree, the defense is that accused, enraged at his wife's confession of adultery, shot her in the heat of passion without deliberation or premeditation, evidence to show that the condition of the wife's clothing indicated that menstruation had not ceased at the period to which her alleged declaration referred, and to show that an examination of the uterus showed that the wife was not pregnant at the time of her death, is inadmissible.

Time required for premeditation and deliberation in homicide cases.—Continued.

For instance in *People v. Conroy* (97 N. Y. 62, 2 N. Y. Crim. R. 565), it is held that "the shortness of the time elapsing between the conception of the intention and its execution forms no legal defense of the crime" of murder in the first degree.

This space of time must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity, which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case.

People v. Boggiano, 179 N. Y. 267, 72 N. E. 101.

Leighton v. People, 88 N. Y. 117.

People v. Majone, 91 N. Y. 211.

People v. Conroy, 97 N. Y. 62, 2 N. Y. Crim. R. 565.

People v. Hawkins, 109 N. Y. 408, 17 N. E. 371.

People v. Johnson, 139 N. Y. 358, — N. E. —.

People v. Constantino, 153 N. Y. 24, 47 N. E. 37.

People v. Kennedy, 159 N. Y. 346, — N. E. —.

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People v. Harris.

Appeal from a judgment of the Supreme Court, Wyoming County.

Prosecution of George Harris for murder in the first degree.

L. A. Walker of Perry for defendant-appellant.

John Knight, Dist. Atty., of Arcade for plaintiff-respondent.

WILLARD BARTLETT, J. The defendant has been convicted of the premeditated and deliberate killing of his wife by shooting her to death at the village of Perry, in the county of Wyoming, on the 20th day of November, 1911. Upon the trial, at the close of the people's case, his counsel in the course of his opening address to the jury admitted that the defendant fired the fatal shots, but said it would be claimed that he was not in a condition to be responsible for the act.

Time required for premeditation and deliberation in homicide cases.—Continued.

In *People v. Clark* (7 N. Y. 385, 2 Edm. Sel. Cas. 294), a case arising under the old law (2 Revised Statutes 656, §§ 4, 5) and before the legislature made deliberation, as well as premeditation, a necessary ingredient of murder in the first degree, the court said: "If there be sufficient deliberation to form a design to take life and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder no matter whether the design is formed at the instant of striking the fatal blow, or whether it be contemplated for months; it is enough that the intention precedes the act, although that follows immediately." Although this very excerpt from the opinion of Judge Johnson is quoted with approval by Chief Judge Ruger in *People v. Conroy* (97 N. Y. 62, 2 N. Y. Crim. R. 565), a case which arose under our present statute, nevertheless Chief Judge Cullen in *People v. Koenig* (180 N. Y. 155, 72 N. E. 993) says that he would be loath to uphold a charge where the proposition formulated by Judge Johnson constituted the only instruction to the jury on the subject of deliberation. While admitting that it may be logically correct, he says it may also be liable to mislead a jury. He then goes on to say that "Probably the best definitions of murder in the first degree under our present law are to be found in the opinions in

At the time of the homicide George Harris and Beatrice, his wife, were boarding and lodging at the house of John W. Wheeler in the village of Perry, occupying a room on the second floor. They were respectively 25 and 21 years of age. He worked in a cutlery manufactory and she in a knitting mill in the village. They were married on December 8, 1906, in Perry, being both then engaged in the same employments. There had been two separations of the couple during their married life; one in 1910, when the wife gave birth to a child who survived but a short time, and the other from February to the early part of October, 1911, in consequence of the husband's drinking habits. The reconciliation which terminated this separation appears to have been due to the husband's advances quite as much as to the wishes of the wife. After they thus came together, at the beginning of October, 1911, they seem to have lived in harmony at Mr. Wheeler's in Perry until the evening of the homicide. On that day the defendant left off work about 10 o'clock a. m., because he did not feel well, and spent

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Leighton v. People (88 N. Y. 117), and People v. Majone (91 N. Y. 211, 1 N. Y. Crim. R. 94)." In the Leighton case the court said: "If the killing is not the instant effect of impulse, if there is hesitation or doubt to overcome, a choice made as result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder."

And in the Majone case the court said: "Under the statute there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill, and when the time is sufficient for this it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case."

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most of the time until evening frequenting a pool room with the exception of a visit home for dinner, when he met his wife and accompanied her part way to the knitting mill, to which she went to resume work in the afternoon. He stayed around this pool room until after 6 o'clock and drank a good many bottles of beer; he says possibly 10 or 12. Returning home while the Wheeler household were at supper, he went to the room occupied by himself and his wife, where she speedily joined him. Mr. and Mrs. Wheeler and the other boarders went out early in the evening and none of them had returned at the time of the tragedy which ensued. At about 8 o'clock the report of several pistol shots and the scream of a woman, apparently proceeding from the Wheeler house, were heard by the occupants of dwellings in the vicinity. Shortly afterward the defendant, apparently in a condition of great emotional excitement, appeared at the door of a neighboring residence and asked the inmates to get a doctor, saying that his wife had shot herself, and adding, in response to an inquiry as to what the trouble was: "Oh, we had a few words and I went out; oh, if

Time required for premeditation and deliberation in homicide cases.—Continued.

In *People v. Ferraro* (161 N. Y. 365, 55 N. E. 931), the scene of the homicide was a beer garden or yard in the rear of a building. A short time before the act of killing unfriendly words passed between the defendant and deceased. When deceased left the yard the defendant followed him out, and, without uttering a word, drew a razor from an inside pocket of his coat or vest, opened it, put his left hand on the shoulder of the deceased, and, with the razor in his right hand, inflicted the fatal wound. The court held that the interval between the act and the infliction of the fatal wound, though very short, was sufficient for reflection which implies deliberation.

The defendant in *People v. Conroy* (97 N. Y. 62, 2 N. Y. Crim. R. 565), used a revolver in killing the deceased. After driving a bar-room crowd from the bar-room into an adjoining room, the defendant, who was a police-officer put his hand into his hip pocket and endeavored to pull out his revolver. Although he was expostulated with and told not to fire, he continued his efforts to remove his revolver which was caught in the

she had only waited! A ghastly picture was revealed to the physicians and others who hastened to the defendant's room. His wife lay dead in her chair, evidently shot to death by a revolver which the incomers found held in her right hand. There were four wounds on her body, any one of which was sufficient in and of itself to have caused death. One cartridge remained intact in the pistol, except that it was dented in such a manner as to indicate that two efforts had been made to discharge it; the shells of the four other cartridges were empty.

From the very first the defendant insisted that his wife had committed suicide. According to his earlier statements, a controversy had arisen between them in regard to his drinking shortly after he came in; this went on until she asked him to get her a glass of water; while he was out in the hall on his way to procure it, he heard a shot; and returning to the room he saw smoke around his wife's head, upon which he rushed out, calling for Mrs. Wheeler.

When the defendant took the stand as a witness, after the concession of his counsel that he had fired the fatal shots, his

Time required for premeditation and deliberation in homicide cases.—Continued.

pocket. He soon released it, and leveling it in the direction of the crowd fired. Chief Judge Ruger in his opinion said: "It was competent for the jury to find from the circumstances, that the defendant had a purpose, formed after more or less deliberation, at the time his hand moved in obedience to the suggestion of his mind to take the pistol from his pocket, and that this purpose influenced him during the time he was releasing his pistol from his pocket, and while he was conveying it from its usual receptacle to the position from which it was discharged at Keenan."

In *People v. Brunt* (11 N. Y. S. R. 59, aff'd 108 N. Y. 656, 15 N. E. 435, 1 Silvernail Ct. App. 586), it was also held that an inference of deliberation and premeditation was proper where sufficient time elapsed after the intent to permit the defendant to draw a revolver from his pocket.

In *McCann v. People* (6 Park. Crim. R. 629), the evidence showed that at the time the defendant killed deceased by stabbing him with a knife he was in a violent passion immediately induced by the insulting language of deceased accompanied with a severe blow. The court held that there

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account of the events immediately preceding the tragedy was as follows: "I went home and went upstairs; took my hat and coat off. I don't remember whether I hung them up or laid them on the bed. Took a drink of whisky out of the bottle and sat down on the bed. My wife then came up and went over and sat in a chair. I kind of laid on the bed there and we talked of different things. I can't remember all we said; something about going to keeping house. I don't remember all that was—I think we mentioned something about a pillow she was raffling off, and I felt sick and I vomited in the bowl there in the room; and then I kind of laid down in the bed again for a while, I couldn't say how long, and I went and got another drink of whisky out of the bottle, and by wife kind of objected to it, and we had a few words about my drinking. She said she thought I had had enough; that I didn't need any more. I took another drink of whisky and went back and sat on the bed. She said she guessed she had made up her mind to leave me on account of my drinking; she was going away with the man she loved. I asked her who that was, and she

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was not sufficient time for premeditation to justify a verdict of murder in the first degree.

The evidence in *People v. Constantino* (153 N. Y. 24, 47 N. E. 37), shows that during an affray the defendant repeatedly placed his hand upon his revolver and threatened to kill somebody; and when the decedent approached toward him and before he fired the fatal shot, from half a minute to two minutes elapsed while he stood facing the decedent, and threatening to shoot him if he approached nearer. The court held that the question whether there was sufficient premeditation and deliberation upon the part of the defendant to constitute the crime of murder in the first degree was a question of fact for the jury.

In *People v. Pullerson* (159 N. Y. 339, 53 N. E. 1119), the defendant killed his victim by choking her to death. The medical expert who made the autopsy testified that the choking would have to continue for the space of about three minutes in order to produce death. The court, in referring to this testimony said: "He consequently had that time to consider the

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said 'Ralph Traber.' I told her that he would not go with her; that he was out of her class. She said that he would have to for he had got her in the family way while we had been apart. She said he would have to take care of her; he had got her in the family way while we had been apart. I don't remember what happened after that until some one told me she had been shot."

The convenient presence of the revolver was explained by the statement that the defendant had taken it out of his trunk the day before and had placed it on the commode with the intention of selling it.

As the case went to the jury, the defense had resolved itself into the contention that in consequence of intoxication and the emotion aroused by his wife's declaration of her illicit rela-

Time required for premeditation and deliberation in homicide cases.—Continued.

nature of his act." There were other circumstances bearing on the question of deliberation and premeditation and the court said that the question was properly left to the jury.

The defendant in *People v. Johnson* (139 N. Y. 358, 34 N. E. 920), was a convict. After a fight he broke away from his keepers and drew an open knife from an inside pocket. He advanced about fifteen feet upon another convict and stabbed him with the knife. This convict then struck the defendant with a broom handle and retreated, but the defendant followed him up and stabbed him fatally. The court said: "While all this occupied but a few moments, there was time, although very brief, for deliberation and premeditation."

From the defendant's own testimony in *People v. Governale* (193 N. Y. 581, 86 N. E. 554), it appears that, after a quarrel in which the defendant shot a man in the leg, he ran 550 feet with policemen in pursuit; he then chose a position behind the angle in the hallway of a building and afterwards took his revolver from his pocket and shot and killed one of the police officers. The court said: "Assuming that the defendant did not decide to shoot and kill his pursuers until he stopped in the hallway, there was time for him, though brief, to deliberate and meditate upon his design after he concluded to stop and while he removed the revolver from his pocket and in his deliberately aiming for the purpose and with the intent of killing the officer."

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tions with Traber the defendant was incapable of the premeditation and deliberation requisite to constitute the crime of murder in the first degree. The evidence, however, was sufficient to warrant the jury in rejecting this view and in returning the verdict which they did.

As has been pointed out, six attempts were made to discharge the revolver, four of which were successful. The time which must have elapsed between the first and the sixth effort might well be regarded as a sufficient period within which deliberation was possible. *People v. Ferraro*, 161 N. Y. 365, 375, 55 N. E. 931, and cases therein cited. And the placing of the revolver in the hand of the victim so as to simulate suicide indicated the consciousness of having committed a premeditated crime. It is true the surrounding circumstances show that the premeditation and deliberation were of very short duration in all human probability; nevertheless, if these elements exist at all, they suffice to sustain a conviction of the highest degree of homicide. It remains to inquire whether any error of law was committed upon the trial to the substantial injury of the defendant sufficient to nullify the jury's disposition of the questions of fact in the case. Here we encounter several serious obstacles to the affirmance of the judgment.

The apparent absence of any adequate motive on the part of the defendant for deliberately killing his wife was one of the difficulties of the prosecution in the way of obtaining a conviction of murder in the first degree. As indicative of the existence of a reason for desiring to get rid of his wife, the district attorney introduced evidence of his intimacy with a prostitute and another woman of questionable character. A woman who declined to state whether she was a prostitute or not, testified to meeting the defendant at Hornell four or five years ago and to having received visits from him from time to time after that for four or five months. It was two or three years prior to the trial when she had last seen him, although she had sent him a postal card as late as November, 1910. After stating that she did not remember that he had written to her on the subject of marriage, she said, "He might have made the re-

mark or written in some of his letters that we might be nearer to each other, or something like that;" but in answer to a question from the court she said she did not think that this was since she left Hornell over four years ago. The other intimacy which the prosecution was permitted to prove was with a woman named Bonita La Marez, known as the snake charmer, who lived at a boarding house in Perry by Mrs. Anna E. Barber. In the summer of 1910, at the time of the absence of his wife, the defendant called upon this woman on a number of evenings in each week. When told that he was a married man, Mrs. Barber said she thought it improper for the defendant to call there but she did not stop it. The prosecution was also allowed to prove that letters passed between the defendant and Bonita La Marez during the same period to the extent of three letters from each. Their contents were not shown, nor was there any proof of illicit intercourse between this woman and the defendant.

The question of the admissibility of this evidence is raised by appropriate objections and exceptions. We think it was too remote and that it afforded no basis for any inference that the defendant desired to get rid of his wife by reason of his preference for any other woman. The rule is well established that when a husband is charged with the murder of his wife it is competent to show his relations with a paramour. *People v. Scott*, 153 N. Y. 40, 50, 46 N. E. 1028. The reason of the rule is stated to be that such evidence tends to establish the absence of affection for the wife and a motive for getting rid of her. The rule, however, does not extend so far as to permit proof of mere temporary intimacy with a prostitute for the same purpose, particularly where such intimacy has existed at a time when the husband and wife were voluntarily living apart. The learned district attorney seeks to sustain the admission of the evidence under consideration by reference to the case of *People v. Montgomery*, 176 N. Y. 219, 225, 68 N. E. 258, 259, where it was said: "It is the settled law of this state that, upon a trial for the murder of a husband or wife, the improper relations of the accused survivor with persons of the

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opposite sex may be given in evidence upon the subject of motive." Taken literally and without reference to the context, this statement would extend to a single illicit sexual act, however remote it might be in point of time. That such was not the meaning of the court is apparent from the reason of the rule as subsequently stated by Judge Werner and the character of the cases cited in support of it. Evidence of this character is admissible, he says, because it tends "to repel the presumption of love and affection that arises out of the marital relation and to establish a motive for the desire to get rid of one who, under normal conditions, would be the natural object of kindness and protection." 176 N. Y. 226, 68 N. E. 260. It may be added that it is only when the evidence has this tendency that it should be received at all; and the cases cited were none of them simply temporary aberrations from the part of virtue, however reprehensible these must be deemed, but they generally involved a relation like that of a man with his mistress or a notorious liaison in open disregard of the husband's duties toward his wife, implying a preference for another woman, the influence of which might lead a husband to desire to put his wife out of the way.

There was nothing of this character in the defendant's relations over four years before the trial with the woman whom he met at Hornell. Her vague testimony to the effect that he might have made the remark or written to her that they "might be nearer to each other or something like that" is not worthy of serious consideration as tending to show that he contemplated marriage with a woman who was evidently the inmate of a common house of prostitution and that he was willing to kill his wife in order to enjoy her society. Nor were the defendant's visits to Bonita La Marez during his wife's absence in the summer of 1910 any more pertinent upon the question of motive. Indeed, as the testimony on this subject appears in the record, it is necessary to resort to the purest speculation to infer that any sexual improprieties were involved in these visits. The jury, however, were invited thus to speculate by placing such evidence before them.

A second error was committed in receiving the evidence which was offered for the purpose of showing that the defendant had endeavored to escape from the Warsaw jail, where he was imprisoned upon the present charge against him. Five prisoners, including the defendant, were kept in the same corridor during the daytime. In December, 1911, the sheriff found in this corridor a file, three large spoons, a piece of wire, and a buttonhook. The spoons had been filed into a shape resembling that of the key which unlocked the corridor, and two of the defendant's fellow prisoners testified that he had assisted in using the file upon the spoons in order to change them into the shape which they presented when offered in evidence. Most of the spoons were in the corridor when the defendant was brought to the jail, and some of the other prisoners had been working on them before the defendant was admitted, and it did not appear that he had participated in any conversation relative to a plot to escape or anything of the kind. The mere participation of a new prisoner in the fashioning of a possible instrument of escape which previous inmates of the jail had begun to construct before his advent cannot be regarded as evidence of the guilt of such new prisoner within the rule which permits an inference of guilt from an attempt to escape arrest or incarceration. It would be preposterous to say of the act of the defendant, as was said of an attempt to escape in *People v. Rathbun*, 21 Wend. 509, 519, that the attempt "implies guilt and operates against the party like a confession." It had no real significance on the question of the defendant's guilt or innocence and the jury should not have been allowed to consider it.

Both the errors which have been considered might possibly be disregarded under section 542 of the Code of Criminal Procedure, which empowers the court to give judgment upon the appeal without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties, although it may be said that a multiplication of errors, even of a technical character, may make them so numerous that when considered together they cannot be deemed harmless.

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We now come to the consideration of an objection, however, which if it be well taken is in the view of a majority of the court fatal to the judgment. Upon the cross-examination of the defendant, after he had been questioned in regard to the statement which he attributed to his wife that she was in the family way by Traber, he was questioned and answered as follows: "Q. So this simmers down, does it, to your contention that this act was done by you simply because she told you of that? Is that so? A. It must be. I had no other information as to her condition except what she told me, in no way, shape, or form." It was manifest from this answer and what the witness had previously stated in regard to his wife's declaration concerning her relation with Traber that he wanted the jury to understand that he was incensed by these declarations as a husband naturally would be and that, in consequence of the anger thereby induced, he shot his wife in the heat of passion, enraged at her confession of adultery, but without deliberation or any premeditated intent to cause her death. This being the defendant's position, the district attorney contended that any fact which rendered it improbable that the wife would make such a statement in reference to her conduct was relevant to the issue. With this view, over objection and exception, he introduced in rebuttal the testimony of two women as to the condition of the wife's clothing indicating that menstruation had not ceased at the period to which her alleged declaration referred; and the still more important testimony of Dr. Goodwin and Dr. Brownell, who examined the remains of the wife, which had been exhumed during the trial at the direction of the district attorney, and ascertained from their examination of the uterus that the wife was not pregnant at the time of her death. The most important question upon this appeal is whether this evidence of these two women and these doctors was properly received. The argument in favor of its admissibility is that it was improbable that the wife would have declared herself to be pregnant if such was not the fact; and hence that proof that she was not pregnant tended to show that the defendant was not testifying truthfully in regard to

the statement by the wife relied upon as an excuse for his murderous assault.

Professor Wigmore, with his characteristic ability, argues in favor of the proposition that the objective truth of a reported fact relied upon as inducing the action of a defendant may sometimes be relevant, and says that this seems clear "when the non-existence of the fact is offered as tending to show that the witness testifying to the communication of the alleged fact is not testifying truly." 5 Wigmore on Evidence, pp. 30, 31. On this point he cites *Knapp v. State*, 168 Ind. 153, 155, 79 N. E. 1076, 11 Ann. Cas. 604, a murder case where the plea was self-defense. The defendant testifies to having heard before the affray that the deceased while attempting to arrest an old man had clubbed him to death. This fact, if true, was admissible as evidence of the defendant's state of mind. The prosecution offered to show that in truth the old man had not been clubbed but had died of senility and alcoholism. This was admitted as tending to show the improbability of the clubbing having occurred, and therefore the improbability that the defendant had heard of it by report or rumor. The principle applied in this Indiana case is precisely analogous to that which must be applied in the case at bar if the judgment is to be upheld. It also finds support in *Commonwealth v. Hourigan*, 89 Ky. 305, 12 S. W. 550, which was a prosecution for murder in the first degree, where the defendant was a physician. He testified that about a year before the killing the deceased applied to him to prescribe for a young lady, telling him in substance that having seduced her he had given her medicine from which she was suffering, and that he wanted the defendant to relieve her. Upon such refusal, according to the testimony of the defendant, the deceased became very angry at him, threatened to whip him and said he would make him sorry for it. The commonwealth, by way of contradiction, offered to prove by the young lady, her mother and stepfather that at the time indicated there was nothing the matter with her. The Court of Appeals of Kentucky held that the proof thus offered was admissible. "It is true their testimony would not have

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shown conclusively that the conversation as detailed by the accused never took place, but it would have so tended, and while but an indirect contradiction, yet it was competent to enable the jury to judge of the probability of its ever having taken place."

While conceding that the nonexistence of the facts said to have been declared by the wife is a circumstance of probative force tending to some extent at least to render it improbable that she actually made the statement attributed to her, the court is of opinion that evidence of this character is inadmissible. It introduces a collateral issue into the case tending to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention, and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned. The doctrine applicable here is well stated by Professor James B. Thayer in this "Preliminary Treatise on Evidence at the Common Law" (page 516) as follows: "The law of evidence undoubtedly requires that evidence to a jury shall be clearly relevant and not merely slightly so; it must not barely afford a basis for conjecture but for real belief; it must not merely be remotely relevant but proximately so. Again, it must not unnecessarily complicate the case or too much tend to confuse, mislead, or tire the mind of that untrained tribunal, the jury, or to withdraw their attention too much from the real issues of the case." Pursuing the same line of thought he points out that evidence, although probative, may be too slight, conjectural, or remote to be admissible or may complicate and confuse the case too much; the rule being that the law forbids unnecessary complication, delay, and tediousness. Authoritative decisions hostile in principle to the admissibility of such evidence have been rendered by the courts of last resort in California, Kentucky, and Texas; and there is an expression of opinion to the same effect in a case in this court.

In *People v. Hurtado*, 63 Cal. 288, the defendant had been convicted of murder in the first degree. The wife of the defendant as a witness in his behalf testified that she confessed

to him before the homicide that she had been guilty of adultery with the deceased and that the confession was followed by great emotional disturbance on the part of the defendant. The defendant offered to prove, as corroboration of the testimony of the defendant's wife that she had confessed adultery, the independent fact that she had been seen entering a house of ill fame in company with the deceased. The trial court sustained the objection of the prosecution to this evidence, and the Supreme Court of California upheld the ruling. "We know of no principle," said McKinstry, J., "which would permit the defendant to strengthen or bolster up the statement of the witness that she had declared to defendant she had committed adultery by proving that in fact she had committed adultery. *Evidence that she had committed adultery would not tend to prove that she confessed to her husband she had committed adultery.*"

In *Shipp v. Commonwealth*, 124 Ky. 643, 99 S. W. 945, 10 L.R.A.(N.S.) 335, the appellant had been convicted of the murder of one Smith. The plea was not guilty on the ground of insanity, and, in support of this plea, he testified that on the Saturday preceding the Monday, which was the day of the killing, his wife confessed to him her sexual misconduct with Smith. He also offered to prove by his son that the boy had heard his mother confess her intimacy with the deceased. This the trial court refused to admit, but notwithstanding the refusal "the commonwealth was allowed to prove in rebuttal by some 20 or 30 witnesses, the best citizens of the town and surrounding community, that Mrs. Shipp was a lady whose reputation for virtue and chastity was good and above reproach." The appellant complained of this; and the Kentucky Court of Appeals concluded, "upon reason and authority analogous to the point in question, that the testimony of the wife's good character was incompetent, and the court should not have allowed it to go to the jury. The wife was neither a party to the action nor a witness in the case. Her reputation for chastity was not in issue."

In *People v. Webster*, 139 N. Y. 73, page 80, 34 N. E. 730, page 732, the defendant was tried for murder in the first de-

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gree but was convicted of manslaughter. He was accused of having killed one Charles E. Goodwin. He admitted the killing but contended that it was justifiable on the ground of self-defense. The wife of the defendant was a witness in his behalf and testified that just prior to the homicide she had told him that the deceased had made improper advances to her. While the wife was under examination, a discussion arose as to whether she should be allowed to state what the deceased had actually done. This the court would not permit but said that she might state what she told the defendant that the deceased had done but could not state whether the deceased had in fact done the things mentioned. "That the witness might state any communication she made to the defendant at or about the time or shortly prior to the occurrence as to anything that the deceased did; that the only material thing was the communication, and it was entirely immaterial whether the things disclosed actually happened." The court also added that the jury must not consider the question whether the communications made by the wife were true; that they were admitted only to show the condition of the defendant's mind when he fired the shot. In the Court of Appeals it was not claimed that any error was committed in the reception or rejection of evidence upon this branch of the case, but it was argued that the remarks of the trial judge were unfair and prejudicial to the defense because they conveyed to the jury the impression that the judge believed the defendant to be guilty of the crime of murder. As to this Judge Maynard, writing for this court, said: "We do not think the language of the learned trial judge is fairly susceptible of such an interpretation. It was no more than a clearcut statement of a most pertinent legal principle. The charge was murder, the defense a justification, and the court merely said, in terms not liable to misconstruction, that no wrong done by the deceased to the wife was available as a justification, but, if the defendant believed that the wrong had been committed, the state of mind induced by the belief might be considered in determining

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the motive and intent of his actions." 139 N. Y. 81, 34 N. E. 732.

It would be contrary to the teachings of judicial experience to assume that the evidence that Mrs. Harris was not in fact pregnant was without influence upon the minds of the jury. It was brought out at the very close of the case. The frozen body had been exhumed only a few hours previously for the purpose of the examination which the medical witnesses described; and the jurors retired to deliberate with the picture of this ghastly occurrence vividly impressed upon the imagination.

Whatever might be said of the other errors which have been considered in favor of disregarding them in the exercise of our power under section 542 of the Code of Criminal Procedure, no such view can be taken of this evidence. Its reception was so clearly harmful as to entitle the defendant to a new trial.

The judgment of conviction should therefore be reversed, and a new trial ordered.

CULLEN, C. J., and WERNER, HISCOCK, CHASE, and HOGAN, JJ., concur. COLLIN, J., absent.

Judgment of conviction reversed, etc.

Heskell v. Auburn Light, Heat & Power Company.

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(Court of Appeals, June, 1913.)

HESKELL, Respondent, v. AUBURN LIGHT, HEAT & POWER COMPANY, Appellant.

(209 N. Y. 86, 102 N. E. 540. Rev'g 152 App. Div. 902, 136 N. Y. Supp. 1137.)

1. Appeal and error — Duty of Court of Appeals to examine evidence when Appellate Division decision not unanimous.

Where the decision of the Appellate Division affirming a judgment for the plaintiff is not unanimous, it is the duty of the Court of Appeals to ascertain if there is proof permitting the jury to return a verdict in favor of the plaintiff. If there is no such evidence tending to support the verdict, the submission of the case to the jury was error.

2. Licenses — Telephone company using power company's pole as licensee.

Where a pole erected in the street is the private property of a power company, and a telephone company attaches its wires to the pole without any especial arrangement or agreement or without any specific consent on the part of the power company, but where the power company for a long period of time knows of and passively

Note. — Duty to protect licensee from injury through contact with electric wire.

Where a person comes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property, passively, acquiesces in his coming, the owner is not liable for negligence if an injury is sustained by reason of a mere defect in the premises, for such person has taken all the risk upon himself. This is the general principle, and is now well settled by repeated adjudications. A careful search however discloses but two cases that come within the limits of this note. They are *Mangan v. Hudson River Telephone Co.* (50 Misc. 388, 100 N. Y. Supp. 539), and *Wittleder v. Citizens' Electric Illum. Co.* (50 App. Div. 478, 64 N. Y. Supp. 144.)

acquiesces in the location of the telephone wires on its pole, the relation of the telephone company to the power company is that of a licensee, as to the purposes for which it used the pole.

3. Licenses — Employee of telephone company using power company's pole as licensee — Duty of power company toward such employee.

The employee of a telephone company which has attached its wires to the pole of a power company without agreement, but without objection, is a mere volunteer or naked licensee in going upon or using the pole, and the power company owes him the sole duty of abstaining from inflicting intentional or wanton or wilful injury, as he uses the pole subject to all the concomitant conditions and perils.

Appeal from a judgment of the Appellate Division, Fourth Department.

Duty to protect licensee from injury through contact with electric wire.— Continued.

In *Mangan v. Hudson River Telephone Co.* (50 Misc. 388, 100 N. Y. Supp. 539), the plaintiff's intestate, an employee of the defendant telephone company, received a shock of electricity which caused his death, while near the top of a pole owned by an electric railroad company, on which were wires belonging to the defendant illuminating company, as well as wires belonging to his master, the telephone company. At the time he received the shock he was engaged in attaching a wire, belonging to the defendant illuminating company and which he had unfastened, to its pin and glass insulator. The court said that as to the defendant illuminating company, the plaintiff's intestate was upon the pole engaged in work upon the illuminating company's wire either as a licensee or a trespasser, and that in either event it owed him no active duty. That each must be held to the exercise of reasonable care, and that neither could rely upon the discharge of any active duty by the other. And further that as to the question of repair, the defendant illuminating company owed no duty to the intestate to keep its wire properly insulated at the place where he received his injury.

The plaintiff in *Wittleder v. Citizens' Elec. Illum. Co.* (50 App. Div. 478, 64 N. Y. Supp. 114), was a young boy. He was injured by coming in contact with a live wire belonging to the defendant, while playing on a stairway built by a railroad company to enable passengers to reach its elevated station. The railroad company had authorized the defendant to maintain its electric wires on a railing of the landing of this stairway.

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Action by Emma J. Heskell, as administratrix of Frank Heskell, deceased, against the Auburn Heat, Light & Power Co. to recover damages for the death of plaintiff's intestate resulting from his contact with an electrically charged wire belonging to the defendant while upon one of its poles as licensee.

William H. Harding, of Syracuse, for defendant-appellant.

A. Lee Olmsted, of Syracuse, for plaintiff-respondent.

COLLIN, J. The death of the plaintiff's intestate resulted from his contact with an electrically charged wire belonging to

Duty to protect licensee from injury through contact with electric wire.—Continued.

In reaching the question as to the duty which the defendant owed the plaintiff, the court said: "The record shows that children were in the habit of using this stairway and platform, and frequently played thereon; *non constat* but that they came thereon by express permission of the railroad company or under an implied license. The case must therefore be disposed of upon the basis that the boy was rightfully upon the stairway, and, if so, the defendant owed him the same measure of care it owed to any other person rightfully thereon. In this respect the jury were authorized to find that the wire was so placed as to menace the safety of a person who should inadvertently throw his arm over the rail, and, as the danger of injury was very great on account of the hidden force which the wire carried, negligence could be properly predicated of the placing of the wire in such close proximity to the stairway as to permit of contact by such an act. Under the proof in this case, the most we think, which can be claimed by the defendant is that the boy was upon the stairway under an implied license. At least, the jury would be authorized so to find. Assuming such to be the fact, and that the defendant could avail itself of the same rule as could the owner of the property, we think enough appeared to charge the defendant with negligence. The measure of the obligation, under such circumstances, has been fairly well defined in this state. For mere passive negligence the defendant would not be liable. That is, an omission to do a proper act does not create liability, while the intervention of an active agency does."

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the defendant while upon one of its poles. The action is to recover the damages sustained by reason of the death.

Inasmuch as the decision of the Appellate Division was not unanimous, we must ascertain by a scrutiny of the evidence whether or not there was any proof permitting the jury to return a verdict in favor of the plaintiff. If there was no evidence that tended to support the verdict, the submission of the case to the jury was error. *Hickok v. Auburn Light, H. & P. Co.*, 200 N. Y. 464, 93 N. E. 1113; *King v. Village of Ft. Ann*, 180 N. Y. 496, 73 N. E. 481.

Under the evidence and the charge to them, the jury might have found as the facts most favorable to the plaintiff: The pole stood in a street of the city of Auburn and belonged to and was used by the defendant to support its wires in its business of furnishing electricity for light, heat, and power. The wires were upon cross-arms affixed to it, and carried powerful and dangerous currents of electricity. The intestate was not an employee of or connected with the defendant. He was an employee of the Auburn Telephone Company two of whose wires were fixed to the pole at its very top and therefore above the cross-arms which supported defendant's wires. On the date of the accident, May 20, 1911, the intestate was directed by the telephone company to ascertain and report to it what was to be done to remedy a reported defective condition of the telephone wires, and he came in contact with the wire while he was executing the direction. The telephone wires were extended to defendant's pole from a pole of the telephone company which was located across the street from it and was a part of the telephone system. They passed from defendant's pole downward at an angle with it into a building. They were fixed to the pole of defendant without any express arrangement or agreement between the companies or specific consent on the part of the defendant. The defendant through a long time prior to the accident knew of and passively acquiesced in this location of the telephone wires. The intestate received the shock from which his death resulted through contact with a defectively insulated part or the dangerous position of one of defendant's wires.

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The trial justice denied the motions of the defendant that the plaintiff be nonsuited, and that a verdict in its favor be directed, and submitted the case to the jury upon the theory that if they found the defendant knew that the wires of the telephone company were on its pole and acquiesced in their remaining there until further notice, and that the linemen of the telephone company would have to go up the pole from time to time, the duty of the defendant toward those linemen, as toward its own employees, was to render the situation on the pole as free from danger as it could be made by the exercise of reasonable prudence in adopting those safeguards which experience had shown would lessen the dangers that otherwise would be present, and if the defendant neglected to fulfill that duty, and the intestate was not guilty of contributory negligence, the plaintiff was entitled to their verdict. The facts which the jury found, as the evidence and the charge permitted, did not justify the submission to them or support the verdict.

The pole was the private property of the defendant, which, although it was within the street, had the right, inherent in ownership to exclusively possess, use, and control it. The telephone company was not by virtue of any arrangement or agreement with the defendant the transferee or possessor of any fraction of that right. It in the original fastening of the wires to the pole was, as to the defendant, a trespasser, and the termination of that relation and the rise of another could be found only through implication in the silent assent of the defendant to its action. It ceased being a trespasser because, under the verdict of the jury, the attitude of the defendant toward it in regard to the use of the pole was not hostile or prohibitive and was tacitly and impliedly permissive and acquiescent. It did not acquire any legal right to go upon or use the pole. The sufferance and acquiescence of the defendant implied its permission, and permission involves a license, but it created no right, and the defendant could at any moment have forbidden the telephone company the further use for any purpose. Under the facts as found, the relation of the telephone company to the

defendant was that of a licensee as to the purposes for which it used the pole. *Nicholson v. Erie Railway Co.*, 41 N. Y. 525.

Common apprehension, sound reasoning, and legal principles have defined or recognized two classes in those who, as licensees, enter upon and use the property of others. The one class consists, speaking generally, of those who act upon the invitation, express or implied, or the inducement of the owner or who necessarily enter on business with him, or in the discharge of a public or private duty; the other consists of those who act voluntarily, without invitation, express or implied, or inducement from the owner or not through a private or public duty. The duty of the owner to either class differs fundamentally from that to the other, and to each it is clearly and with a precision frequently impossible in the law established and prescribed. While the ascertainment of the law is easy, judicial industry, apprehension and discrimination must frequently be exercised to decide to which class a licensee complaining of the acts of an owner belongs. The determination of that question in the present case will denote the legal duty of the defendant toward the intestate, and the conclusion as to whether or not the evidence tended to support the verdict will be consequent.

Mere permission or consent, whether express or implied from sufferance or passive acquiescence, to do a certain thing gives a license but does not necessarily imply an invitation to do it. The circumstances which may offer or sustain an implied invitation to a person to enter upon the property of another are, as the authorities attest, manifold, and whether they have that effect cannot be tested by any general and invariable rule. The Supreme Court of Massachusetts has formulated a rule potently indicative of the essentials of an implied invitation, if not comprehensive and absolute, as follows: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit

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may not be for the benefit of the occupant." *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463. The rule is approved in the recent cases of *Norris v. Nawn Contracting Co.*, 206 Mass. 58, 91 N. E. 886, 31 L.R.A.(N.S.) 623, 19 Ann. Cas. 424; *Stanwood v. Clancey*, 106 Me. 72, 75 Atl. 293; *Purtell v. Philadelphia Coal Co.*, 256 Ill. 110, 99 N. E. 899. In *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L.R.A. 714, 39 Am. St. Rep. 436, the court said: "We have found no support for any rule which would protect those who go where they are not invited, *but merely with express or tacit permission, from curiosity or motives of private convenience*, in no way connected with business or other relations with the occupant." In the absence of some relation which inures to the mutual benefit of the owner or occupant of the property and the injured person, or to the former alone, it is generally held there is not an implied invitation on the part of the former.

Between the defendant and the telephone company there was no mutuality. It was a matter of complete indifference to the former whether the wires of the latter were on or off the pole. There was between them no privity or contractual relation. The pole was not maintained by the defendant for the use of the telephone company as well as itself. The defendant did not receive any compensation, accommodation, privilege, or benefit on account of the use of the pole by the telephone company. The sole relation between them was that created by the gratuitous permission of the defendant, implied through its passive acquiescence, that the telephone company might, until otherwise notified, have its wires as they were upon the pole and exclusively for its own benefit and convenience. The facts as found by the jury did not constitute an invitation, express or implied, to the telephone company to go upon or use the pole, and in doing so it and its employees were mere volunteers or naked licensees who used the pole subject to all the concomitant conditions and perils and to whom the sole duty of the defendant was abstention from inflicting intentional or wanton or willful injury. *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525; *Fox v. Warner-Quinlan*

Asphalt Co., 204 N. Y. 240, 97 N. E. 497, 38 L.R.A.(N.S.) 395; Cusick v. Adams, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772; Birch v. City of New York, 190 N. Y. 397, 83 N. E. 51, 18 L.R.A.(N.S.) 595; Sullivan, Ex'r, v. Waters, 14 Irish Com. L. 466; Redigan v. Boston & Me. R. R. Co., 155 Mass. 44, 28 N. E. 1133, 14 L.R.A. 276, 31 Am. St. Rep. 520; Fitzpatrick v. Glass Mfg. Co., 61 N. J. Law, 378, 39 Atl. 675; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411.

Manifestly the intestate in going upon the pole in the discharge of his duty as the employé of the telephone company was in the same relation to the defendant which his employer held. Sullivan v. Tioga R. R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793.

The cases in which a company is under the duty of exercising reasonable care and prudence in securing the safety of the employé of another upon its pole go upon a principle inapplicable to and inhibited by the facts of this case. Illingsworth v. Boston Electric Light Co., 161 Mass. 583, 37 N. E. 778, 25 L.R.A. 552; Cincinnati Gas & Electric Co. v. Archdeacon, Adm'r, 80 Ohio St. 27, 88 N. E. 125; Downs v. Mo. & Kans. Telephone Co., 161 Mo. App. 274, 143 S. W. 889; Newark Electric Light & Power Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L.R.A. 725; Trout v. Laclede Gas Light Co., 151 Mo. App. 207, 132 S. W. 58; Chicago, etc. R. Co. v. Vandenberg, 164 Ind. 470, 479, 480, 73 N. E. 990; Sullivan v. Tioga R. R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793.

The evidence does not authorize the claim and it is not made that there was on the part of the defendant an act of affirmative, intentional, or willful misfeasance, fault, or wrong. There was rather a negligent failure to so act that its wires would have been in safe condition and location—a default in not doing something which it might refrain from doing lawfully and without responsibility or liability to the intestate.

The pole did not suggest that it was property which any one had a right to use and assume to be in safe condition as does the crossing of a railroad, private in fact but public in use and

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enjoyment (Barry v. N. Y. C. & H. R. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Lamphear v. N. Y. C. & H. R. R. Co., 194 N. Y. 172, 86 N. E. 1115; Sweeny v. Old Colony & N. R. R. Co., 10 Allen [Mass.] 368, 87 Am. Dec. 644; Bowler v. Pacific Mills, 200 Mass. 364, 86 N. E. 767, 21 L.R.A.[N.S.] 976, 128 Am. St. Rep. 432), nor did the telephone company or the intestate use the pole through any inducement or allurement put forth by the defendant.

The principle which was decisive in *Braun v. Buffalo General Electric Co.*, 200 N. Y. 484, 94 N. E. 206, 34 L.R.A. (N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, does not apply to the facts here. In the *Braun Case* the intestate was injured while upon the property of his employer, across which ran the wires of the defendant therein, who might reasonably have apprehended that conditions might arise or exist through which the owner of the property or his employ  s might come in contact with the wires. Had the wires of the defendant here been upon a pole of the telephone company it would have been under the duty toward the intestate of exercising reasonable care to maintain a proper insulation.

A decision that a property owner, who permits expressly or impliedly the affixing to his trees or structures by a telephone or telegraph company of its wires, enters into the duty towards it and its employ  s of exercising reasonable vigilance and care to maintain a safe access to them would be contrary to the common understanding and practice, would be unjust, and might give rise to serious consequences. The evidence presented by the record before us did not tend to support the verdict or permit the submission of it to the jury.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, CUDEBACK, and MILLER, JJ., concur.

Judgment reversed, etc.

(Court of Appeals, December, 1913.)

CAMMANN, Respondent, v. BAILEY, Appellant.

(210 N. Y. 19, 103 N. E. 824. Rev'g 156 App. Div. 87, 141 N. Y. Supp. 41.)

1. Wills — Vested gift — Testator's intent.

Where a testator by his will gives and bequeaths to his son certain shares of corporate stock to be kept by testator's executors and transferred to him with the income collected thereon from the time of the testator's death when he (the son) reaches 21 years of age; and the will also provides that "\$20,000 so first set apart shall be added to the aliquot share of my son in the balance of said residuary estate

Note. — *Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.*

- a. *Introductory*, 232.
- b. *When rule applicable*, 234.
- c. *When rule not applicable*, 240.

a. Introductory.

This rule, that where the only gift is found in a direction to divide at a future time, the gift is future and not immediate, contingent, and not vested, apparently has many exceptions, and is to be used as an aid to ascertain the intention of the testator and not as a force to pervert it. All the cases admit, and it is beyond all question, that the intention is the paramount rule of construction and if the intention is apparent that the estate shall vest in remainder, immediately upon the testator's death, it must control and supplant the rule, which is applicable where there is merely a direction to divide at a future time.

As Judge Finch observed, in *Matter of Tienken* (131 N. Y. 301, 30 N. E. 109), with reference to the rule of construction in cases of a testamentary direction for future payment, or delivery: "I have observed

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and be held for his benefit and belong to him, subject to the provisions as to the income and principal of my residuary estate and the trust shares therein hereinafter contained," and further that the income is to be divided "into as many equal shares as I shall leave me surviving children or descendants of children, including the said son, and shall apply such shares of income to the use of those of my children or descendants who shall be infants, and pay over to those of them who shall have reached majority the shares of income set apart for them, the descendants of any deceased child of mine to take the share which their parent (my child) would have taken if living;" and it is also provided that the residuary estate after the death of the widow "shall be divided into as many equal shares as I shall leave children or descendants of children, one share for the benefit of each child and one for the benefit of the descendants taken together of any such deceased child," the intention of the testator is to make vested gifts to his son, subject to the provision therein for his widow, and also postponing the time when his son should have possession of the gifts.

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

in general that where it (the rule) has prevailed, it has been where no contrary intention was fairly indicated, and where its own force was somewhat strengthened and its indication corroborated by further facts."

In *Smith v. Edwards* (88 N. Y. 92), Judge Finch had, also, said of this rule: "It applies only where beyond the direction for future distribution there are no words and no provisions, which import a present, or vested gift, or indicate such an intent." In that case, he had "explored the will in vain" for any adequate ground, which would take the bequest out of the operation of the rule.

And Judge Andrews in *Goebel v. Wolf* (113 N. Y. 405, 21 N. E. 388), says: "The rule invoked, as others of like character, is subordinate to the primary canon of construction, that the construction shall follow the intent, to be collected from the whole will; and that the intention of the testator, so ascertained, must prevail; and that general rules, adopted by the courts in aid of the interpretation of wills, must give way when on a consideration of the scheme of the will, or of special clauses or provisions, their application in the particular case would defeat the intention."

The only logical subdivision of this note seems to be a separation of

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2. Wills — Rules of construction — Testator's intent.

Rules for the construction of wills are for the sole purpose of ascertaining the intention of the testator, and if the intention is clear and manifest it must control, regardless of all rules that have been formed for the purpose of determining their construction.

3. Wills — Vested remainder.

The law favors the vesting of remainders.

Appeal from an order of the Appellate Division, First Department.

Action for the construction of the last will and testament of Edmund S. Bailey, deceased.

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

those cases which apply the rule from those which do not. This subdivision has therefore been followed.

b. When rule applicable.

In *National Park Bank v. Billings* (144 App. Div. 536, 129 N. Y. Supp. 846), there was a gift to trustees, to hold until testator's son attained the age of 25 years, and then convey to him. The court held that the will gave to the son only a contingent interest.

In *Marson v. Purdy* (9 N. Y. Supp. 579, 31 N. Y. S. R. 130, 56 Hun, 642), the testator devised certain land to executors in trust, to divide it into as many shares as testator has children, and to apply the income of each share to the use of each child during minority and during the widowhood of testator's wife. By another clause of the will he devised each share to each child "upon the death or remarriage of my wife" and on the child's attaining majority. The court held that each share would vest only on the happening of the conditions mentioned, and that the share of an unmarried daughter dying during the lifetime of testator's widow, could not be devised by her.

The will in *Matter of Crane* (164 N. Y. 71, 58 N. E. 47), provided that, "upon the decease of my said wife I order and direct that my estate be divided as follows, viz: Equally between my brothers and sisters and my niece, Flora W. Bulkley, each one to take one equal share thereof, * * *

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Bronson Winthrop, of New York City, for defendant-appellants Isabelle Lydia Bailey and others.

Henry W. Jessup, of New York City, for defendant-appellant Susannah Gibson Bailey.

Charles H. Beckett, of New York City, for plaintiff-respondents.

CHASE, J. This action is brought to obtain a construction of the will of Edmund S. Bailey, who died November 4, 1908, leaving a widow and four children, two sons and two daughters,

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

Provided further that if any of my said brothers and sisters and niece shall depart this life before my said wife leaving lawful issue him or her surviving, then the share of the one so dying shall be paid over to their issue in equal shares." The court held that the brothers and sisters and niece took contingent remainders only, subject to be divested as to any one of them by his or her death prior to the decease of the testator's wife.

The will in *Schlereth v. Schlereth* (173 N. Y. 444, 66 N. E. 130), gave all of the property to the executors in trust to pay the income to testator's only daughter during her life, and after her death, leaving issue, to pay over the income to such issue in equal shares until the youngest should attain the age of 21 years, and then to divide and distribute the whole trust fund among such issue in equal shares. The court held that the estate did not vest until the time arrived for distribution.

By the will in *Brooklyn Trust Co. v. Phillips* (134 App. Div. 697, 119 N. Y. Supp. 401), the testator gave \$10,000 to his executors in trust for a certain beneficiary for life and after her death he directed that it be divided equally between her two children upon their respectively arriving at the age of 21 years. The court held, that the vesting depended upon two contingencies, namely, survival of the beneficiary, and arrival at the specified age; and upon the failure of either the estate failed to vest. The court said: "There are not in this devise any direct gifts to the children of Mrs. Phillips, but a direction that the executors should convey to them

by a previous marriage. Such children were his only heirs at law and next of kin. His son Edmund Smith Bailey died January 5, 1912, at the age of 23 years, leaving a widow but no descendants. He left a will which has been duly probated as a will of real and personal property, and pursuant to which the defendant, the Farmers' Loan & Trust Company, has been duly appointed executor and trustee thereunder. By the will of Edmund S. Bailey, he gave to his son Edmund Smith Bailey certain specific gifts, also, "in special consideration of his bearing my [testator's] name, five shares of the capital stock of the Home Insurance Company, which are to be kept by my executors until he reaches twenty-one years of age, when the

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

at a future time on certain contingencies. They were to take through the medium of a power in trust and the time of the vesting of the principal of the legacy was thus deferred until the time of distribution."

The will in *Dickerson v. Sheehy* (156 App. Div. 101, 141 N. Y. Supp. 35), gave the residuary estate to trustees to pay over to a son a certain proportion of the income until he attained a certain age, and then to convey, transfer, and pay over to him certain proportions of the residue of the real estate and personalty. The court held that the son's interest in the residue was contingent on his attaining that age. To make the proposition clearer, the facts of the case are that the testator by his will, gave, devised and bequeathed all the rest, residue and remainder of his property to his executors in trust for the following purposes, among others; to collect the rents, issues and profits of his real estate and pay two-fifths thereof to his widow during life; to divide the other three-fifths into two equal parts, and apply so much of one part as his executors deemed proper to the maintenance and education of his son Edward until he attained that age to pay over to him such part from time to time until he attained the age of 21 years. When the will provided: "Upon my son attaining the age of 25 years, to convey, transfer and pay over to him three-tenths of all the rest, residue and remainder of all my real estate and one-half of all the rest, residue and remainder of all my personal estate, together with full unexpended interest, income and profits of the said one-half of the said two equal parts mentioned in said paragraph "6" to my son Edward C. Sheehy, his heirs, representatives and assigns for

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same shall be transferred to him together with all income that may have been collected thereon from the time of my decease." He further provided: "And whereas my late wife's aunt, Mrs. Jane V. C. Cooper, died some years since leaving a will by which she made certain provisions for the three elder of my children and no provision for my youngest child, Edmund S. Bailey, whereby should my property be equally divided among my children he would not be so well off pecuniarily as the others owing to the said provision made for them by Mrs. Cooper; now, in order to remedy such inequality I provide that before division of my residuary real estate into shares under the ninth clause of this will my trustees shall set apart there-

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

ever. * * * Upon the decease of my said wife, if my said son be then 25 years of age, to convey and transfer to my said son Edward C. Sheehy, one fifth of all the rest, residue and remainder of my estate; if my said son be not then 25 years of age, then upon his attaining that age." The son Edward died when he was 24 years of age. The court said: "The question, then, is whether the interest which Edward took in the real estate were contingent or vested. There are in the will no direct words of gift to him. The entire residuary estate is given to the executors, with directions to them, upon his reaching the age of 25 years to convey, transfer and pay over to him a portion of the estate. The will will be searched in vain to find any words indicating an intention that the son Edward, until he reached 25 years of age, should have any interest in the real estate itself, other than the income derived therefrom. It is only upon his attaining that age that the executors were directed to convey, transfer and pay over. Upon the death of the widow the executors were to convey and transfer a certain interest if Edward "be then 25 years of age, and if he were not then 25 years of age, then upon his attaining that age—clearly showing, as it seems to me the testator's purpose was that Edward's interest should not vest until he became 25 years of age."

The court in *Lewisohn v. Henry* (179 N. Y. 352, 72 N. E. 239), in holding that there was no vesting until the beneficiary reached a certain age, said: "The trustees took the legal title with the usual power of management and with the duty of applying the net income "to have and to hold" each share until the child for whose benefit it had been set

from for the benefit of my son, Edmund S. Bailey, the sum or value in their opinion of twenty thousand (\$20,000) dollars, and after the division of the balance of the said residuary estate into as many equal shares as I leave children or descendants of children under the said ninth clause, the said \$20,000 so first set apart shall be added to the aliquot share of my son Edmund S. in the balance of said residuary estate and be held for his benefit and belong to him subject to the provisions as to the income and principal of my residuary estate and the trust shares therein hereinafter contained."

He further provided that: "Seventh. All the rest, residue and remainder of my estate, real and personal, I give, devise and

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

apart should reach a certain age, and upon arrival at that age they were to convey and pay over to him or her a part of the capital in fee simple and absolutely. The use of the word 'upon' followed by a direction to convey, indicates that until the contingency named should happen there was to be no vesting * * * no part of the capital was to go to the children until the time fixed for absolute transfer to them should arrive. The direct gift to the executors, in the absence of any gift of capital to the children in the first instance, show that there was no intent to vest title in them prior to the date named for distribution. The gift of capital to the children was through the direction to convey, and there was no vesting until the time to convey came around."

In *Delany v. McCormack* (88 N. Y. 174), the testator by his will gave his real estate to his son for life, and in fee in case his son married and had issue. If his son died without issue, the will directed the executors to sell the real estate and distribute the proceeds among the testator's next of kin. The court held that the proceeds of the real estate were to be distributed among those who were such at the time of the distribution, and that the devise was contingent.

In the will construed in *Matter of Baer* (147 N. Y. 348, 41 N. E. 702), the testatrix provided that in case her daughter Matilda should survive her daughter Emeline, and the daughter Emeline should die without issue, the rents and profits of certain real and personal estate held in trust for Emeline should be applied to the support of Matilda during her life, and

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bequeath to my executors hereinafter named as trustees, nevertheless for the uses and purposes following: Except as hereinafter modified by instructions to and discretions conferred upon them. I direct them to convert all my said residuary estate, real and personal, into cash as soon as and when they may deem best and reinvest the proceeds in improved real estate situated in the city of New York in the borough of Manhattan indicating as my preference. * * * And in case I shall at my decease have investments in any of the foregoing securities, bonds or stocks I empower and advise my executors and trustees to retain the same as trust investments. And I direct that my said residuary estate shall be held and managed by my said trustees during

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

after her decease the trustees were directed to convey the real and personal estate to the children and lawful heirs of the deceased mother of the testator, share and share alike, *per stirpes*. Emeline died without issue and before Matilda. The court held that the children of the testatrix's brother did not take a vested remainder as of the death of the testatrix. To quote from the opinion: "Moreover, there is not in this devise any words of direct and immediate gift to the children or heirs of the brother, but a direction that the trustees should convey to them at a future time on a certain contingency. They were to take through the medium of a power in trust and the time of the vesting of the interest was thus deferred, in form at least, until the time of distribution. It is a case then where, as the cases express it, 'futurity is annexed to the substance of the gift,' and warrants the application of the principle that where a future interest is devised not directly to a given person, but indirectly through the exercise of a power conferred upon trustees, the devise is designed to be contingent, and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift."

But the will construed in *Matter of Hogarty* (62 App. Div. 79, 70 N. Y. Supp. 839), testatrix bequeathed her residuary estate to her executors, as trustees, to convert the same into cash, and pay the income of one-half of it to a sister, and on her death to divide the principal equally among her children. The court held that the children had no vested interest in the remainder until the death of their mother.

the life of my wife should she survive me and from the net income thereof they shall pay to her quarterly the sum of five thousand dollars (\$5,000) intending hereby to provide for her an income at the rate of twenty thousand dollars (\$20,000) per annum; and during the life of my wife from any balance of the net income received from the said residuary estate after fulfillment of the aforesaid provisions for my wife my trustees shall pay over to my son Edmund Smith Bailey or apply to his use so long as he shall remain a minor, the proportion of such balance of residuary income earned by \$20,000 thereof, and shall divide the balance yet remaining of such income into as many equal shares as I shall leave me surviving children or descend-

Application of the rule that a testamentary gift, confined to a mere direction to divide at a future time, is contingent and not vested.—Continued.

c. When rule not applicable.

The testator, by the will construed in *Murtha v. Wilcox* (47 App. Div. 526, 62 N. Y. Supp. 481), after devising his estate to trustees, directed that they pay \$1200 a year to his father for life, and divide the balance of the net income equally among three persons. He further directed that the trust should continue until the death of his father, and until one of said three persons reaches majority; and that then he directed that the estate be equally divided among said three persons. The court held that the gifts to such three persons vested immediately on testator's death, subject only to the trust.

In *Carr v. Smith* (25 App. Div. 244, 49 N. Y. Supp. 351), the court held that the rule would not be applied, if, from a consideration of the whole will, it is to be collected that the intention of the testator was to give a vested remainder. The clause of the will construed in that case was as follows: "I direct my executors to invest the sum of \$20,000 in safe and productive securities, and pay the income arising therefrom semiannually to my mother, Hannah Smith, during her natural life, and after her death to divide the principal sum between Lewis Adam Wilson and Annie Louisa Wilson and Annie Smith, the daughter of my deceased brother Abel, share and share alike." In construing this clause the court said: "The sole question presented is whether, by the provisions of the clause above quoted, a vested remainder in one third of that fund was given to Annie Smith. The learned referee concluded, from an exami-

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ants of children including the said Edmund S. Bailey and shall apply such shares of income to the use of those of my children or descendants who shall be infants and pay over to those of them who shall have reached majority the shares of income set apart from them the descendants of any deceased child of mine to take the share which their parent (my child) would have taken if living."

He further provided: "Ninth. After the death of my wife I direct that my whole residuary estate including the 74th street house given to her for her life or its proceeds if sold shall be divided by my trustees subject to the provision for the increase of the share therein of my said son Edmund S. Bailey herein-

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nation of all the provisions of the will, that it was the intention of the testator that a remainder should be vested in the three persons to whom this fund was to be given after the death. The correctness of this conclusion is challenged by the appellant, who insists that the construction of the will is controlled by the rule that where, in a will, the only gift is contained in a direction to divide at a future time, it is contingent, and not vested. * * * The general rule is undoubtedly well settled. * * *, but, as has many times been said, the rule is not invariable, and always applicable, even in a case where the sole gift is contained in a direction to divide, and it will not be applied if, from a consideration of the whole will, it is to be collected that the intention of the testator was to give a vested remainder."

In *Matter of Crane* (164 N. Y. 71, 58 N. E. 47), Chief Judge Parker, after quoting from the opinion of Judge Finch in *Smith v. Edwards* (88 N. Y. 92), as follows: "It has been often held that, if futurity is annexed to the substance of the gift, the vesting is suspended, * * * that where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift," said: "It is true that to these general rules of construction there are exceptions, and the cases noting them can be grouped under two heads: First, if the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator, and the class of legatees is to

before contained into as many equal shares as I shall leave children or descendants of children, one share for the benefit of each child and one for the benefit of the descendants taken together of any such deceased child and the said shares shall be held and managed by my trustees and the income from each share during the infancy of the persons for whom it is held shall be applied by my trustees under this will for the benefit of such person and as each of said beneficiaries reaches the age of twenty-one years he or she shall be paid thereafter the net income of the trust share held for him or her; unless such person was born after my death in which case he or she shall be paid the principal of the trust share held for him or her to the time

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be determined as of that date, for futurity is not annexed to the substance of the gift. * * * The second exception is where there are words importing a gift in addition to the direction to executors or trustees to pay over, divide or distribute. In such a case the general rule of construction does not govern, because the language employed, outside of the direction to divide or distribute, imports a gift, and therefore the situation is precisely as if the will contained words of gift. In other words, to state the proposition in familiar phrase, where from the examination of the whole will it is apparent that it was the intention of the testator that the estate should vest in the beneficiaries immediately upon his death, the rule governing where there is merely a direction to divide at a future time must be subordinated to that broader rule which requires that the intention of the testator shall control, where it can be ascertained within the four corners of the will."

In *Steinway v. Steinway* (163 N. Y. 183, 57 N. E. 312), the will of the testator directed his trustees that the income of corporate stock be paid to legatees therein named until a certain date, and at such time directed the principal to be paid over to them." The court held that the shares were vested, because the payment of interest or income to each of the legatees took the case out of the rule as to gifts under a future direction to pay and divide. To quote: "The plaintiff invokes the rule that where there is no gift, but by direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. * * * But the cases

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of attaining majority. Upon the attaining of age of thirty years by either of my sons the principal of the share until that time held for such son shall after the death of my wife be paid over, transferred or conveyed to him. Should either of my sons or daughters at any time die before me leaving lawful issue surviving such issue shall take the same share of principal and the same share of income the parent my son or daughter would have taken under this will if living."

It is provided that the shares of the residuary estate held in trust for the daughters of the testator shall be so held during their lives, respectively, and at the death of the daughters, respectively, "the same shall go to her issue if any in equal shares

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show how rare it is that there is no other expression in the will indicating the time when the gift is to vest. If there are other expressions, all must be considered."

By the will construed in *Matter of Young* (145 N. Y. 535, 40 N. E. 226), the testator directed his trustees that "the farm should be equally dividend between" his three named sons, on the decease of the wife of the testator. The court held that the gift was vested.

The only gift found in *Matter of Tienken* (131 N. Y. 391, 30 N. E. 109), was in a direction to sell the testator's real estate after the death of his widow, and divide the proceeds "equally between my children share and share alike." The court in holding the gift vested said: "We have heretofore said that the rule of construction founded upon a gift flowing only from a direction to divide has many exceptions and is to be used as an aid to ascertain the intention and not as a force to pervert it."

In *Goebel v. Wolf* (113 N. Y. 405, 21 N. E. 388), the will gave the residuary estate in trust until the testator's youngest child should arrive at age, and directed that until such time one-half of the income was to be paid to the widow, and the other one-half was to be used in the payment of mortgages upon the estate. It further directed that upon the arrival of the youngest child at 21 years of age, the estate was to be divided among testator's children, share and share alike. One child died before the time of distribution arrived, without issue, and the gift was held vested. The court said: "This construction also prevents the disinheritance of issue

per stirpes, but in case she shall leave no issue, then the trust share to that time held for her shall go to the Children's Aid Society incorporated in the year 1855 under the laws of the state of New York, to be used for the purposes of said society, more especially for the support of the Industrial Schools."

It was found by the trial court, and it is not disputed, "that every legacy or other provision or claim in favor of any person not a party to this action has been paid or otherwise satisfied." And "that since the death of the testator, Edmund S. Bailey, the income on his residuary estate has amounted to upward of \$60,000 a year. The trustees have paid \$20,000 a year to testator's widow and up to the time of Edmund Smith Bailey's death on

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of any child who may marry and die before the expiration of the trust period, a consequence which no one can doubt the testator never intended."

There were several separate and independent trusts created by the will construed in *Bowditch v. Ayrault* (138 N. Y. 222, 34 N. E. 514), some of which might last for the full term permitted by statute. In giving his residuary estate the testator directed his trustee to sell and convert the whole thereof, both real and personal, into money, and "as fast as practicable" to divide two-thirds thereof, between the children of testator's brothers and sisters "who may be living at the time" of his death, "and to the descendants of such of said children as may be deceased when said estate, or any part thereof is distributed," said two-thirds "to be divided between all such children and their descendants equally, * * * all the children of a deceased person to receive collectively the portion their parent would, if living at such distribution, be entitled." It was held that the gift was in substance to the children of the testator's brothers and sisters living at the time of his death, and that it then vested in those children, subject to be divested by the death of a child thereafter, and the substitution of his or her descendants, if any; if there were no such descendants, then the share remained vested, and upon the death of the child, formed part of his or her estate, to be disposed of by the will of such decedent, or, in case of intestacy, as provided by statute. The court said: "It is claimed on the part of the plaintiff that the language of this will brings the case strictly within what he states to be the general rule, that, where in the case of personalty there is no gift except by way

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January 5, 1912, had from time to time distributed the balance of the income equally between testator's four children * * * except that Edmund Smith Bailey had been paid in addition to his one-quarter share the proportionate amount of the income earned by the sum of \$20,000."

The Special Term by interlocutory judgment adjudged in substance that under the will of Edmund S. Bailey his son Edmund Smith Bailey took a vested interest upon the death of Edmund S. Bailey in the sum of \$20,000, and also in one-fourth part of the testator's residuary estate after deducting from said residuary estate said sum of \$20,000, and in the income on said \$20,000, and the one-fourth part of the testator's residuary es-

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of direction to the executor or trustee to pay or divide and pay at a future time, the vesting of the property in the beneficiary will not take place until that time arrives. The cases cited by the learned counsel for the plaintiff do not show that there is an absolute and unvarying rule which prohibits the vesting where the language does not in terms make a gift directly to the legatee, and where the direction is to divide and pay at some future time. The intention of the testator is still the guide, and the intention must be sought from the language actually employed. * * * Each will must, to a certain extent, be the guide to its own construction, and when, as here, we have language used which appears to us upon the whole case to import a present gift to these children with a possible substitution of their descendants in their place in case of their death, it is our part to provide for the carrying out of the obvious intent of the testator."

In *Campbell v. Stokes* (142 N. Y. 23, 36 N. E. 811), the testator by his will devised and bequeathed to his trustees an equal share of his residuary estate for each of his children living at his death to receive and apply the rents, issues and profits thereof to the use and support of such child during his natural life; and upon his death he directed his trustees "to convey, transfer and pay over and deliver the said share to his or her lawful issue *per stripes*, and not *per capita*." The court after stating that the trust was created to secure to the testator's sons and their several shares for life and to preserve the principal for their issue, said: "There is no room for the application of the technical rule some-

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tate after deducting said \$20,000, subject to the payments to said Susannah Gibson Bailey for life, and to the principal being held in trust as provided by said will, and that Edmund Smith Bailey was not divested of his interest in the estate of his father, Edmund S. Bailey, by reason of his death in the lifetime of the testator's widow and before he reached the age of 30 years, and that said interest of Edmund Smith Bailey in said sum of \$20,000 and in said one-fourth part of the testator's residuary estate after deducting said \$20,000 passed under his (Edmund Smith Bailey's), will in accordance with the terms thereof.

The Appellate Division reversed the interlocutory judgment of the Special Term and construed and adjudged the will of

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times resorted to, to ascertain whether an interest given by a will is vested or contingent, that where the gift is only found in the direction to divide at a future day, this circumstance may be considered and have weight. It is a rule for ascertaining the real intention of a testator and not for defeating it."

In *Matter of Hedger* (6 N. Y. Supp. 769, aff'd 9 N. Y. Supp. 347, 56 Hun, 643), the executors were directed to sell the real estate after the death of the testator's wife and to divide the proceeds as directed. From this provision, and the direction that such devises and bequests were to take effect and such division be had after the decease of said wife, as provided by another clause of the will, it was argued that the legacies and devises contained in other clauses of the will which were to take effect after the death of the said wife, did not vest until after the death of said wife. This argument was based upon the rule that, where there is no gift but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. The court in holding that this rule did not apply said: "Unless the intention is unequivocally expressed to the contrary, it is the duty of the court to so interpret the expressions in a will as to favor the vesting of estates, rather than the opposite. The legatees and devisees who would have had an immediate right to the possession of the property upon the ceasing of the precedent estate were all in being, and their shares ascertainable, at the time of the testator's death; consequently their interests were vested."

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Edmund S. Bailey, deceased, "to mean that the testator intended to divide all of his children's income earned and accruing after the death of his son Edmund Smith Bailey into as many shares as he had children or descendants of deceased children living during the period in which the income has been received and is to be divided; that such income was payable only to the testator's then living children and then living descendants of any deceased child, if any." An appeal was taken from such judgment of reversal to this court pursuant to an order of the Appellate Division, by which it certified that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals. The questions certified are as follows: (1) Did the testator's

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In referring to the rule in *Matter of Brown* (154 N. Y. 313, 48 N. E. 537), the court said: "The appellant invokes this rule and urges that the will contains only a direction to divide and pay over the income and the corpus of the estate to the grandchildren, after the happening of the events specified in the will. This question was fully considered by this court in the case of *Goebel v. Wolf* (113 N. Y. 405, 21 N. E. 388), in which it was held that the general rule, when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent and not vested, is subordinate to the primary canon of construction, that the intent, to be collected from the whole will, must prevail,—and taking the whole will together, it was the intention that the children should each take a vested remainder, upon the death of the testator, in one-fourth of the residuary estate, dependent upon the termination of the trust; that the share of the one who died, with the accumulations of income therefrom, descends to his heirs or next of kin, according to the nature of the property, and that such descendants were entitled to any income which may thereafter accrue during the trust period. We have already referred to the provisions of the will in which the testator declared his intention that the principal should be equally divided between the children of his daughters absolutely for their own property, subject however, to the life estates created by the will, and to the construction which should be given thereto. This, we think, clearly takes the case out of the rule invoked and brings it within the rule adopted in the case of *Goebel v. Wolf*."

son Edmund Smith Bailey have any vested interest in the income of the estate of his said father, the testator, Edmund Smith Bailey, and, if so, did such interest pass under the will of said Edmund Smith Bailey, the son of the testator? (2) Did the testator's son Edmund Smith Bailey have any vested interest in the principal of the estate of his father, the testator, and, if so, did such interest pass under the will of said Edmund Smith Bailey, the son of the testator?

In our opinion the intention of the testator, as gathered from

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By the will construed in *Warner v. Durant* (76 N. Y. 133), the testator gave to his executors, in trust, \$275,000, which was then invested in bond and mortgage, to hold and keep invested, and he directed them among other things to pay annually to Oliver Blush seven per cent interest on \$15,000. He also directed that at the expiration of five years from his decease, the principal be paid over to the said Blush. The court in holding that the legacy vested in Blush immediately upon the death of the testator, said: "This case presents the question, whether a legacy became vested in the legatee in his lifetime, though he died before the time fixed for the payment. It is a general principal, that where the gift is absolute, and the time of payment only, postponed, time not being of the substance of the gift, but relating only to the payment, does not suspend the right but merely defers the payment. This principle will not act in this case to vest the legacy; for the gift was not at the outset, to the legatee; and another rule is to be noticed. It is this: Where there is no gift but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. Here the gift was at first to the executors, to hold in trust for five years, and at the expiration of that period to pay over to the legatee. But this rule does not act in this case; for there has been a distinction grafted upon it. It is this: Where the gift is to be severed instantan from the general estate for the benefit of the legatee; and in the meantime, the interest thereof is to be paid to him; that is indicative of the intent of the testator that the legatee shall, at all events have the principal, and is to wait, only for the payment, until the day fixed."

Testator, by the will construed in *Matter of Watts* (68 App. Div. 357, 74 N. Y. Supp. 75), left the use of one-third of his estate to one of his

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all of the provisions of the will, was to make vested gifts to his son Edmund Smith Bailey, subject to the provisions therein for his widow, and also postponing the time when his son should have possession of such gifts. Such intention, so far as it relates to the gift of five shares of the Home Insurance Company capital stock, appears in definite and certain language. Such stock is given and bequeathed to him, to be kept by the testator's executors, and transferred to him with the income collected thereon from the time of the testator's decease, when he

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daughters and her husband "as long as either of them lives," and after their death he gave the said one-third to his said daughter's children, "if she have any; if not, then to go to all my grandchildren." The daughter survived her husband and at her death without issue there was living one grandchild of the testator, and the child of a deceased grandchild. The court held that the grandchildren of the testator took a remainder in the one-third given for the use of the daughter, which vested in them at the death of the testator. The court in holding that the gift was not embodied in merely a direction to divide or to pay or to distribute at a future time, said: "The testator gives and bequeathes the use or interest of the one-third to Betsy and her husband, and he writes, 'after their death I give said one-third to the children,' etc. The mere expression after their death' relates to the termination of the life estate, and does not affect the vested character of the estate."

In *Matter of Elliotts Estate* (27 Misc. 258, 58 N. Y. Supp. 603), the testator devised her property to his wife during life or widowhood. After her death or remarriage he directed his executors to convert the property into money, and out of the proceeds to pay to the legatees named certain sums, "which amounts I do hereby give and bequeath unto them as aforesaid." The court held that the legacies vested on the death of the testator and were not contingent upon the legatees surviving the life or widowhood of the wife.

In *Roosa v. Harrington* (171 N. Y. 341, 64 N. E. 1), the testator by a codicil bequeathed to his executors, in trust, the portion of his residuary estate previously given to a certain grandson, with a direction to pay over the interest or income thereof, or in their discretion the principal, to the said grandson during his life. He further directed in case of not

(Edmund Smith Bailey) reaches 21 years of age. Such intention clearly appears in connection with the setting apart of \$20,000 for Edmund Smith Bailey before the division of the residuary real estate. The will provides: "The said \$20,000 so first set apart shall be added to the aliquot share of my son Edmund S. in the balance of said residuary estate and be held for his benefit and *belong to him*, subject to the provisions as to the income and principal of my residuary estate and the trust shares therein hereinafter contained." The language so employed shows that the testator intended that such \$20,000 should *belong* to Edmund Smith Bailey. The testator's intention as to the residue appears in the fact that the income is to be divided "into as many equal shares as I [testator] shall leave me surviving children or descendants of children, including the said Edmund S. Bailey, and shall apply such shares of income to the use of those of my children or descendants who shall be

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paying over the principal and of said grandson's death without issue "then to pay said principal," to his son and daughter therein named, to be divided equally between them. Upon this clause of the codicil the question arose as to whether the testator's son and daughter were vested, upon the father's death, with any estates in the share so given in trust for the said grandson. The court in holding that they were vested, at the testator's death, with contingent estates in remainder, said: "In construing this will the importance of discovering the intention of the testator, in making a final disposition of his property, is in this consideration that, if one is clearly, or sufficiently, manifest, it must control, without regard to general rules of construction. When the testamentary instrument is colorless, as to intention, or design, then it is that rules of judicial construction are properly resorted to, as aids in giving to the instrument a meaning, which renders it reasonable and capable of legal effectuation. Of course, the main question in this case is whether, by the terms of the codicil, futurity was annexed to, and was of the essence of the gift over to the testator's son and daughter of the trust estate, which he had created for the benefit of his grandson, by reason of the absence of any words of present gift to them, in the language actually used. That is to say; is it true that because, upon the death of the grandson Charles, without

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infants, and pay over to those of them who shall have reached majority the shares of income set apart for them. The descendants of any deceased child of mine to take the share which their parent (my child) would have taken if living." The division was directed to be made among the children or descendants of children surviving the testator. The subsequent provision in that part of the will quoted relating to the descendants of any deceased child refers to the descendants of children of the testator who had died prior to his decease.

The controlling date in determining the gift of income is the date of the death of the testator. The testator's intention appears again in the ninth paragraph of the will relating to the division of the residuary estate after the death of his widow. The testator provides that such residue "shall be divided into as many equal shares as I [testator] shall leave children or descendants of children. One share for the benefit of each child

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issue, the trustees are "then to pay said principal," to the testator's son and daughter, such language must be deemed to control, as an indication that the gift to them depended upon the contingency of their survival? I do not think so. The whole will bears internal evidences of the testamentary purpose to make an equal division among the testator's three lines of descent and to continue the possession and enjoyment of his estate to representatives in those lines. If that be true, we are not warranted in applying general rules of construction, which might thwart that purpose. * * * The construction is not free from difficulty and it is possible, of course, to find decided cases, which may seem, if the language of the opinions alone, is to be regarded, to be in point, either way, upon the argument, but each case as it arises, must be viewed and decided according to its own particular facts and circumstances, and will become a controlling precedent, only, where the facts are the same. * * * All the cases admit, and it is beyond question, that the intention is the paramount rule of construction and if the intention is apparent that the estate shall vest in remainder, immediately upon the testator's death, it must control and supplant the rule, which is applicable where there is merely a direction to divide at a future time."

and one for that benefit of the descendants taken together of any such deceased child."

The important date again is the date of the death of the testator. The residuary estate is to be held in bulk for convenience and to insure the payment of the annuity to his widow. Subject only to such life estate, the testator intended a division into shares as of the date of his death. For convenience, and because the will directs that a part of his real estate be held for the use and benefit of his widow for her life and to insure the payment of the annuity to her, there is no direction for the sale of his real estate or an actual division of his residuary estate until after the death of his wife. The postponement of the actual division of the residuary real property for the reasons stated should not affect the intention otherwise clearly shown of a division of income and principal as of the date of his death. In the case of Edmund Smith Bailey, the \$20,000 was set apart for his benefit before the division of the residuary estate, and the testator directed that such \$20,000 should be added to the aliquot share of his son Edmund Smith in the balance of said residuary estate and be held for his benefit and belong to him.

There is no apparent distinction to be made between the \$20,000 so first set apart and the balance constituting the aliquot share of Edmund S. in the residuary estate; and it seems to us that it was the intention of the testator that the share, together with the \$20,000, should belong to Edmund Smith Bailey. It would be difficult to gather from the will an intention on the part of the testator to withhold the vesting of the aliquot share of Edmund Smith in the balance of his residuary estate while a clear intention is shown that the \$20,000 first set apart to him and added to such aliquot share should be so vested in him. It was so intermingled that the testator should not be held to have had one intention as to the \$20,000 and a wholly different intention as to the one-quarter of the residue after setting apart such \$20,000, unless such difference of intention appears by plain language.

It also appears by the ninth paragraph of the will that the testator, in speaking of the actual division of the residuary estate

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after the death of his widow and of the same being held for the benefit of his sons, respectively, refers to such shares as until that time held for such sons. It thus appears that, although the residuary estate is held in bulk, the part ultimately to be paid over, transferred, and conveyed to Edmund Smith Bailey is at all times prior to the time when it so paid over held for and vested in him notwithstanding it is included for convenience in the residue as a single fund. The intention of the testator being reasonably clear, it is quite unnecessary to discuss the decisions made in other cases involving the vesting of property held in trust.

Rules for the construction of wills are for the sole purpose of ascertaining the intention of the testator, and if the intention is clear and manifest it must control, regardless of all rules that have been formed for the purpose of determining their construction. *Roosa v. Harrington*, 171 N. Y. 341, 64 N. E. 1; *Matter of Tienken*, 131 N. Y. 391, 30 N. E. 109; *Robinson v. Martin*, 200 N. Y. 159, 93 N. E. 488; *Matter of James*, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774.

The law favors the vesting of remainders. *Livingston v. Greene*, 52 N. Y. 118; *Matter of Brown*, 154 N. Y. 313, 48 N. E. 537.

We think that the determination of the Special Term was right, and that the order of the Appellate Division should be reversed, and the interlocutory judgment of the Special Term affirmed, and the questions certified to us should be answered in the affirmative, with costs in both courts to the appellants, other than Susannah Gibson Bailey, payable out of the estate.

CULLEN, C. J. (concurring). I concur in the reversal of the order of the Appellate Division for the reasons stated in my dissenting opinion in *Dickerson v. Sheehy*, 103 N. E. 717. If the decision in that case were to be followed, I should be constrained to vote for affirmance of the order. The opinion of my Brethren in this case proceeds on the rule that a gift of income tends to vest in the beneficiary the capital of which the income is given, a rule well recognized by the testwriters (*Jarman on*

Wills, p. 802) and relied on by me in the Dickerson Case. No opinion was written by the majority of this court in that case, but the decision of the Appellate Division (156 App. Div. 101, 141 N. Y. Supp. 35) proceeded on the theory that the rule was inapplicable because in that case the principal of the fund was not served from the general estate, but the bequest was only of a part of the aggregate income of the whole residuary estate, and I assume that the decision of this court proceeded on the same ground.

In the respect referred to the difference, such as it is, between the provisions of the wills in the two cases tends far more strongly to support the theory of a vested interest in the earlier case than in this. In the Dickerson Case the direction was to apply two-fifths of the rents to the testator's widow during life and one-half of the remaining three-fifths to the testator's son Edward (the one who had died and whose share was in controversy) until he attained the age of 25 years, and then to pay over to him three tenths of the residuary estate, the share of that residuary, the income of which was given to him. In the present case likewise the residuary estate is given in solido in trust to pay over out of the net income to the testator's widow the sum of \$20,000 annually and divide the remainder thereof among the testator's children and the issue of deceased children equally, and upon the death of the widow then to divide the residuary estate into shares. The present case falls far short of the Dickerson Case, so far as the rule of vesting by reason of a gift of the income of a share. There is no share to be set apart to the children of the testator until the death of the widow, while as to the intermediate income there is no gift of the income until after the death of the widow either upon any particular fund or upon any particular portion of a greater fund. If the income of the residuary estate in any year should fall short of \$20,000, the children of the testator would not receive a penny during that year, and under the best of circumstances the income payable to each child would vary from year to year according as the income might vary. How, then, is it possible to say that the income on any particular fund or share of a fund was given to

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the deceased child? While in the Dickerson Case, let the income in any year be big or little, the two sons were always entitled to receive each three-tenths, and the practical result was exactly the same as if the testator had directed his trustees to hold three-tenths of the estate in trust to apply the income to the benefit of the son. The conclusion of my learned Brother that the share of the deceased child, Edmund Bailey, vested, as I understand it, rests on the provision relative to the gift in his favor of the sum of \$20,000. But here, as in respect to the main share, until the death of the widow he is given, not that sum of \$20,000, but only the income that the sum may earn, and the sum is not added to his share until the death of the widow, when his share first comes into existence. See ninth clause of the will. Assuming, however, that the gift of \$20,000 was vested, I am at a loss to perceive just how that tends to prove that the testator intended his other gift made in entirely different language to be vested, and still less how it would tend to vest the share of the other son who might have died, the same as Edmund, under the age of 30 years.

In my judgment the decision we are about to make can be safely rested on one ground alone, and that is the one stated by Judge Andrews in *Goebel v. Wolf*, 113 N. Y. 405, 415, 21 N. E. 388, 390 (10 Am. St. Rep. 464): "This construction (i. e., that the gift was vested) also prevents the disinheritance of issue of any child who may marry and die before the expiration of the trust period, a consequence which no one can doubt the testator never intended." Indeed, to see how far this court will go in holding a legacy vested rather than disinherited remaindermen who may die before the termination of the precedent estate, I refer to *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20. That rule necessarily would have led to a reversal in the *Dickerson Case*. So also the rule cited in the majority opinion in this case, that the law favors the vesting of remainders, was equally applicable to the *Dickerson Case*.

If, however, I err in underestimating the force to be attributed to the \$20,000 gift to Edmund Bailey in the construction of the principal testamentary provision in his favor, still this

much must be conceded, that no counsel, however eminent, could have asserted with any degree of confidence, on that ground alone, that this case would be decided as we are now deciding it. The result of the rule as to the construction of a gift, confined to a mere direction to divide and pay over, has been productive of more litigation than any other rule as to the construction of wills. That nearly all laymen and very many lawyers are wholly ignorant of it, there can be no question. Despite that fact, if it had become a rule of property, it should be respected whether good or bad, but, instead of being a rule of property, it is a rule which unsettles title to property, and the condition of the decisions is such that in almost every case counsel is justified in insisting, if not actually required to insist, that his client shall obtain the decision of the court of last resort on the question. It may very well be that the rule has obtained so long that entire relief from it cannot be obtained except by legislative action. Still it seems to me the plain duty of the courts to limit it as far as practicable, and the doctrine formulated by Judge Andrews would at least relieve the application of the rule from very much of its present uncertainty and save the public and the clients from litigation, as well as avoid the disinheritance of the issue of testators.

GRAY, HISCOCK, COLLIN, and MILLER, JJ., concur with CHASE, J. WILLARD BARTLETT, J., concurs with CULLEN, C. J.

Ordered accordingly.

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(*Court of Appeals, March, 1913.*)

GEDDES COARSE SALT CO., Respondent, v. NIAGARA, LOCKPORT & ONTARIO POWER CO., Appellant.

(207 N. Y. 500, 101 N. E. 456. *Mod'g and Aff'g* 147 App. Div. 917, 131 N. Y. Supp. 1116.)

1. Boundaries — Highway — When included in conveyance of abutting land.

Where property is described as a certain subdivision as laid down upon a certain map, and such map shows the property as abutting at its southerly boundary on a road four rods wide which road in turn has for its southerly boundary the blue line of the enlarged Erie Canal, such description includes the land to the center of the highway, but does not include the entire highway.

2. Boundary — Center of line of highway as — Reference to map.

The general rule is that a conveyance by reference to a map which shows the premises being conveyed as abutting upon a highway as between grantor and grantee conveys to the latter title to the fee of the highway to the center line thereof. This is the rule as against the state as well as against a private grantor.

3. Boundary — Non-accepted highway as.

A grant of property by reference to a map which shows the premises abutting upon a highway, conveys title to the fee of the highway to the center line thereof, even though at the time of the conveyance the highway as shown upon the map has not been accepted and used by the public as such.

4. Boundary — Center line of highway as — Amount of acreage as affecting.

Where property is conveyed by reference to a map which shows the premises conveyed as abutting upon a highway, the fee of the highway to the center line thereof is conveyed, even though the grant by its terms or by reference to a map gives an area of the premises being conveyed which is satisfied without resort to the land included in the highway.

Note.—"When conveyance includes bed of highway," see *infra*, page 262. N. Y. L. Cas. Vol. II.—17.

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Appeal from a judgment of the Appellate Division, Fourth Department.

Action of ejectment by the Geddes Coarse Salt Company against the Niagara, Lockport & Ontario Power Company to compel the removal of wires used for conducting high-power electric currents.

Louis L. Babcock, of Buffalo, for defendant-appellant.

Jerome L. Cheney, of Syracuse, for plaintiff-respondent.

HISCOCK, J. This action was brought as one of ejectment to compel the appellant to remove wires used for conducting high-power electric currents, and strung above the boundaries of a highway, as shown upon a map which will be referred to. The facts which define the controversy are as follows:

In 1902 the state issued to the respondent letters patent, whereby it granted and conveyed to it certain lands theretofore constituting part of the Onondaga Salt Springs reservation, and amongst which was one parcel, alone involved in this action, described as "Subdivision No. 17 (of farm lots 45 and 46) containing 13.42 acres," as said subdivision was laid down on a map of the farm lots in question made by one Greene, deputy surveyor, in August, 1849, and during said month filed in the office of the Secretary of State. Said map showed said subdivision 17 as abutting at its southerly boundary on a road 4 rods wide, and which road, in turn, had for its southerly boundary the blue line of the enlarged Erie Canal, then in process of construction; the distance from this blue line to the base line of the canal as finally constructed and used being upwards of 30 feet. For some time before the grant in question said road apparently was not used by the public in the portion bounding subdivision 17, aforesaid, but at least some part of it seems to have been occupied by a storehouse belonging to the respondent. The letters patent and the map to which reference has been made gave the area of subdivision 17 and other parcels then being con-

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veyed, and such statement of such area is satisfied without incorporating in the grant any portion of the highway. Under these circumstances the question has arisen whether the respondent acquired title to all or to part of said highway, as subdivision 17 abutted on the same, and this question, by consent, was disposed of by the trial court as a question of law; it holding that the respondent acquired title to the bed of the entire highway.

The general rule is that a conveyance by reference to a map which shows the premises being conveyed as abutting upon a highway, as between the grantor and grantee, conveys to the latter title to the fee of the highway to the center line thereof. This is the rule as against the state, as well as against a private grantor, and it applies even though at the time of the conveyance the highway, as shown upon the map, has not been accepted and used by the public as such, and although the grant by its terms, or by reference to a map, gives an area of the premises being conveyed which is satisfied without resort to the land included in the highway. *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Matter of Ladue*, 118 N. Y. 213, 23 N. E. 465; *Trowbridge v. Ehrich*, 191 N. Y. 361, 84 N. E. 297; *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 111, 70 N. E. 213; *Van Winkle v. Van Winkle*, 184 N. Y. 193, 204, 77 N. E. 33.

I see no reason for attempting to build up an exception to this general rule upon the facts presented in this case, but think that the respondent's title extended to the center of the highway, opposite said subdivision 17, as shown upon the map.

The respondent, however, is not satisfied with this, but insists that under its grant it took title to the fee of the entire highway, and thus it has so far been held.

The theory upon which it bases this contention is that the state was not the owner of or interested in land on the southerly side of this highway in such manner as would justify the presumption that it intended to retain title to the fee of such southerly half of said highway. The cases especially relied on in support of this theory are those of *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370, 13 L.R.A. 611, and *Johnson v. Grennell*, 188 N. Y. 407, 81 N. E. 161, 13 L.R.A.(N.S.) 551. Each of

these cases involved the principle, so far as applicable to this discussion, that where a highway has been constructed upon the margin of the grantor's land his subsequent grant of the abutting land should be deemed to include the fee in the whole roadbed, because it will not be assumed that he intended to retain the fee to one-half of the roadbed, under such circumstances.

In the Grenell case the grantor, being the owner of an island in the St. Lawrence river, constructed on its shore a road extending to the waters of the river, and thereafter made a conveyance of land abutting on said roadway, and it was said by Judge Gray, in writing for the court, that "there is no sufficient reason apparent to infer an intention by the grantor, when parting with her title to the only land adjoining the road, to reserve any interest in the fee of the road itself. Manifestly, from the facts, an inducement to the purchaser of the lot was its being shown, and stated, to lie upon the shore of the island, and the enjoyment of the riparian advantages conferred a distinct value. The ordinary presumption is that, in the absence of contradictory terms, the grantor does not intend to retain the fee of the soil in the street." 188 N. Y. 410, 81 N. E. 161, 13 L.R.A. (N.S.) 551.

I do not regard the facts presented in those cases as so parallel with the ones arising here as to compel or justify the adoption of the respondent's contention. The state is the owner of the canal, and, as already stated, between the base line of the canal and the blue line which bounds the highway on the south there is a strip of land of considerable width. Under these circumstances it does not follow, as a conclusion of law, that when the state made its conveyance to respondent it had no interest in retaining the fee to the southerly half of the roadway, or that such retention would secure a useless and barren right. On the contrary, it seems to me that the ownership of this extra strip of 33 feet adjoining the canal lands may be a right of much value and convenience. Thus, again, I feel that we should follow the general rule prevailing in the case of grants of land abutting on highways, and that no sufficiency reason exists for awarding to re-

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spondent the title to the fee of the entire roadway, instead of one-half thereof.

These views lead to the conclusion that the judgment appealed from should be so modified as to determine that respondent acquired title to the northerly half of the highway on which its said premises abut according to said Greene map, and that it have ejectment against appellant as to said premises, and, as modified, affirmed, without cost to either party on this appeal.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, CUDDEBACK, and HOGAN, JJ., concur. MILLER, J., not sitting.

Judgment accordingly.

(*Court of Appeals, October, 1913.*)

MATTER OF PARKWAY.

MATTER OF WOOLF.

(209 N. Y. 344, 103 N. E. 508. *Rev'g* 156 App. Div. 941, 141 N. Y. *Supp.* 1135.)

1. Boundaries — Highway — Interpretation favorable to grantee.

The language of a conveyance which bounds and describes lands by reference to a public highway is to be interpreted most favorably

Note. — When conveyance includes bed of highway.

- a. *General principles*, 262.
- b. *Application in general*, 269.
- c. *Intent of parties*, 280.
- d. *Starting point at intersection of highways*, 290.
- e. *Starting point at intersection of exterior lines of highways*, 291.
- f. *Starting point on side of highway*, 294.
- g. *Side line of highway as boundary*, 297.
- h. *Effect of statement of dimensions of property*, 300.
- i. *Effect of stating acreage*, 300.
- j. *Where breadth of street is mentioned*, 302.
- k. *Reference to map*, 302.
- l. *Effect of ownership by grantor*, 306.
- m. *Specific conveyance of highway*, 307.
- n. *When entire highway included*, 307.
- o. *Rule same in city and country*, 309.
- p. *Conveyance by a municipality*, 311.
- q. *Grant by the State*, 312.
- r. *Alleys*, 314.

a. *General principles.*

The question as to whether the description of a particular lot, in the conveyance thereof, which refers to an abutting street, should be construed

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in favor of the grantee, and under ordinary circumstances, where the conveyance is of a lot abutting on a highway or where the descriptive lines run to or along such highway, the presumption is of an intent on the part of the grantor to convey title to the center of the highway. This presumption, however, must yield to language which shows an intent on the part of the grantor to exclude from his conveyance title to the bed of an abutting street and to limit such title to the exterior lines hereof.

2. Boundaries — Corner lot on highway — Place of beginning.

Where property is described as beginning at the northwesterly corner of a certain street and avenue as laid down on a map, the corner formed by the exterior lines of the street and avenue and not the intersection of their center lines is meant.

3. Boundaries — Highway — Starting point — Importance of.

The starting point in a description of land bounded by a highway

When conveyance includes bed of highway.—Continued.

as including or excluding the half of said abutting street, has been frequently considered and discussed. The rule to be applied has recently been restated by the Court of Appeals, as follows: The general rule, both in England and in this state, is that the fee of the soil of the highway is presumed to belong to the adjoining owners and that a person holding land bounded on a highway between two states is prima facie the owner to the center of such highway subject to the easement of the public to the right of way, but that such presumption can be rebutted by an express provision in the deed to the effect that the fee to the highway was not intended to be conveyed, or by the use of such words as necessarily exclude the highway from the description of the premises conveyed, as where the description of the premises is bounded upon the exterior line of a highway or commences at a point upon one side thereof and thence runs along the side to a point specified, but where the premises are bounded by, on or along a highway, or running along a highway without restricting or controlling words, the instrument must be construed as conveying the grantor's title in the land to the center of the highway. The commencement of the description of premises at a corner or a point particularly specified is always considered important, for ordinarily more attention is given by the parties to the locating of the point of commencement of the description than to the other points, but it is not conclusive, and where it is inconsistent with the other lines described, which show an intent to include or exclude the fee of the highway, effect will be given such intent, and where there is ambiguity with reference to the description or to the commencing point, or where there is doubt with reference to the intent of the grantor,

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is of great importance, and while its effect is not conclusive but must yield where it is inconsistent with other lines in the description, nevertheless it must control the other parts of the description, at least in the absence of some irreconcilable inconsistency.

4. Boundaries — Highway — When excluded from conveyance of abutting land.

Title to the bed of the street is excluded by a description which reads: "Beginning at the northwesterly corner of Walnut street and Second avenue as laid down on said map (previously mentioned); thence running westerly along said street fifty feet; thence northerly parallel with said avenue one hundred feet; thence easterly parallel with said street fifty feet to said avenue; thence southerly along said avenue one hundred feet to the corner aforesaid and place of beginning."

Appeal from a judgment of the Appellate Division, First Department.

Proceedings to acquire title to Parkway in the city of New York for street improvements.

James R. Deering and *James A. Deering*, both of New York City, for appellants *James A. Woolf* and others.

Harold Swain, of New York City, for respondent *Madeline Pierce*.

When conveyance includes bed of highway.—Continued.

the presumption that the fee was intended to pass will prevail; for in such case the construction must be most favorable to the grantee. Where a survey gives the dimensions and quantity of the land conveyed exclusive of the public way, it does not operate to destroy the presumption that the fee to the roadbed was conveyed, for the reason that such dimensions and quantity of the usable land is ordinarily deemed by the purchaser of paramount importance in determining its availability for the uses designed by him. Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bound on one side, but where it appears that the distance given does in fact carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center; and where a line runs to a stake or to a mark upon a fence or a tree upon the bank of a stream or upon the

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HISCOCK, J. This appeal involves a controversy over the right to an award in proceedings to acquire title for street improvements. Without going into the details of the proceeding, it is sufficient to state that the underlying and decisive question is whether, under the description used in one or more conveyances, the grantee took title to the middle or only to the exterior line of a public highway known as Walnut street, now in the city of New York.

The description thus to be interpreted ran as follows: "All that certain lot, piece or parcel of land, situate, lying and being in the town of West Farms, aforesaid, and which is known and designated by the number 267 (two hundred sixty-seven) on a certain map, * * * the premises hereby conveyed being bounded and described as follows: Beginning at the northwesterly corner of Walnut street and Second avenue as laid down on said map; thence running westerly along said street fifty (50) feet; thence northerly parallel with said avenue one hundred (100) feet; thence easterly parallel with said street fifty (50) feet to said avenue; thence southerly along said avenue one hundred (100) feet to the corner aforesaid and place of beginning."

The map in question showed lot 267 as abutting on said highway, and, if this description carried title to the center of the

When conveyance includes bed of highway.—Continued.

side of a highway, and thence along the meandering of the stream or along the highway, the stake, mark or tree will be deemed to indicate the place of the line and not the end thereof, by reason of the difficulty of maintaining a visible object marking the corner in the middle of a stream or in the roadbed of a highway, thus vesting the title in the grantee.

Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33.

When lands are granted bounded upon a highway or a stream not navigable, unless by the terms of the grant, or by necessary implication, the highway or the bed of the stream are excluded, a title will pass to the center of the highway or stream. The reason is obvious. Ordinarily, in a conveyance of that kind, there is no purpose to be served in the retention by the grantor of a narrow strip of land along the boundaries of the land conveyed, and between it and the lands of other proprietors, or in the bed

street, then the award has been properly distributed; if it carried title only to the exterior line of Walnut street, then the orders thus far made were erroneous and should be reversed.

There is no dispute concerning the general principles which govern the interpretation of a conveyance which bounds and describes lands by reference to a public highway. The language is to be interpreted most favorably in favor of the grantee, and under ordinary circumstances, where the conveyance is of a lot abutting on a highway or where the descriptive lines run to or along such highway, the presumption is of an intent on the part of the grantor to convey title to the center of the highway. This presumption, however, must yield to language which shows an intent on the part of the grantor to exclude from his conveyance title to the bed of an abutting street and to limit such title to the

When conveyance includes bed of highway.—Continued.

of a stream, and the intent to grant them will, therefore, be presumed by a conveyance of the adjacent lands bounded "by," or "upon," or "along," such highway or stream, or other equivalent phrases. It depends upon the intent of the parties to be gathered from the description of the premises read in connection with the other parts of the deed, and by reference to the situation of the lands and the condition and relation of the parties to those and other lands in the vicinity, whether the grant extends to the center of the road or stream. This is the recognized rule of interpretation, and it is a question of interpretation and intent.

Mott v. Mott. 68 N. Y. 246.

We find the general rule laid down in Kent's Commentaries, as follows: The law with respect to public highways and to fresh water rivers is the same. The owners of the land on each side go to the center of the road. (3 Kent's Com. 432). Ch. Kent further says: "The idea of an intention in a grantor to withhold his interest in a road to the middle of it after parting with all of his right to the adjoining land is never to be presumed; it would be contrary to universal practice."

In Cortelyou v. Van Brundt (2 Johns. 357, 3 Am. Dec. 439), Judge Thompson stated the general rule to be simply that the fee of a highway belongs to the owner of adjoining ground.

In Adams v. Rivers (11 Barb. 390), it is stated that the legal presumption is that lots bounded by a public street extend to the center thereof.

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exterior lines thereof. Notwithstanding the views of the learned courts below, we think that the effect of the language used in the conveyances before us for consideration was to thus exclude title to the bed of Walnut street.

The description of the premises to be conveyed places the starting point at the "Westerly corner of Walnut street and Second avenue," as laid down on the map referred to in the description. It is so well settled as to be practically conceded by counsel for respondent that the terms thus used meant the corner formed by the exterior lines of Walnut street and Second avenue and did not mean the intersection of their center lines. Thus we have the starting point of the description in the exterior line and on the side of Walnut street, rather than in its center. It is again well settled that the start-

When conveyance includes bed of highway.—Continued.

And in *Stewart v. Metropolitan Elev. Ry. Co.* (56 N. Y. Super. Ct. (24 J. & S.) 377, 4 N. Y. Supp. 445), it is stated that an abutting owner is presumed to own the fee of the street.

At least this general rule, that a conveyance of land bounded by, or upon, a street carries the fee to the center of the street, is founded upon a presumption. It is that, in ordinary cases, there is no reason for supposing an intention in a grantor of lands to reserve the fee in a strip of a street, or highway, bounding them, when its control and use have ceased to be of importance, or of benefit to him.

Haberman v. Baker, 128 N. Y. 253, 28 N. E. 370, 13 L.R.A. 611).

Such a presumption, necessarily, must give way before any evidence of a different intention in the parties. The presumption is not one *juris et de jure* and yields when the grounds upon which it rests are displaced by other evidence.

Dunham v. Williams, 37 N. Y. 251.

Whether a grant of lands shall be construed as extending to the center of the adjoining street is not decided, always, by the mere presence of the words, which give rise to the ordinary presumption, but may be decided by the intention of the parties; as it may be gathered from the description, when read with reference to the situation of the lands and the relations of the parties to them, and to the circumstances which enlighten their transaction.

Mott v. Mott, 68 N. Y. 246.

ing point in such a description is of great importance; and, while it has been said that its effect is not conclusive but must yield where it is inconsistent with other lines in the description (*Van Winkle v. Van Winkle*, 184 N. Y. 193, 204, 77 N. E. 33), it must control the other parts of the description, at least in the absence of some irreconcilable inconsistency. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 71.

I not only do not find the lines of description employed in the conveyances inconsistent with, but rather, as it seems to me, entirely consistent with, this point of commencement. We find that the description thus commencing in the exterior line of Walnut street runs along said street 50 feet; thence northerly

When conveyance includes bed of highway.—Continued.

If the right to the land in a boundary street is rested upon words, which operate by way of presumption and not by way of a precise description, there is no violation of the rules of law in showing, by evidence, what was intended as the boundary line of the grant.

Graham v. Stern, 168 N. Y. 517, 61 N. E. 891, 85 Am. St. Rep. 694.

Where the highway divides two properties the owner of each abutting piece is presumed to own to the centre of the way. The presumption is based on the idea that the adjacent owners originally contributed the land for the road, and this presumption assumes that nothing militates against it in the facts of ownership. But if the grant of the abutting property went only to the side of the road, or the public authorities are vested with the right to the soil of the street the presumption cannot exist.

Haberman v. Baker, 128 N. Y. 253, 28 N. E. 370, 13 L.R.A. 611.

Dunham v. Williams, 37 N. Y. 251.

An intent to exclude the highway will not be presumed, but must appear from the terms of the deed as illustrated by surrounding circumstances, where lands are granted, bounded on a highway. Unless by the terms of the grant, or by necessary implication, the highway is excluded, a title will pass to the center of the highway.

Pollock v. Morris, 51 N. Y. Super. Ct. (19 J. & S.) 112.

The conveyance of a lot bounded on a piece of ground called a street but which is in truth not a street nor a highway, does not convey the land to the middle of such contemplated street.

Matter of Seventeenth Street in City of New York, 1 Wend. 262.

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from it 100 feet; thence easterly parallel with the street 50 feet; and thence southerly 100 feet to the starting point. In other words, we have a piece of land of rectangular shape, and the course which runs away from Walnut street is of the same length as that which runs back to said place of beginning in the exterior line of the street. The length and terminus of the final course in the exterior line of the street being thus definitely fixed, it would make an unusual description to run the parallel line of equal length to the center rather than the side of the street.

While it is impossible to make any complete review of the authorities, even in this state, which have dealt with this general

When conveyance includes bed of highway.—Continued.

The owners of land adjoining a road are entitled to claim property to half of the soil unless a contrary right is proved, but if what appears to be common highway is not in fact laid out as such, or if the public have refused to accept it, it is not a common road or public highway and the adjoining owner cannot claim it, as it is still the private property of the original proprietor, subject perhaps to a mere right of way in the adjoining owner, provided he has taken a deed which bounds him upon it as a street.

Willoughby v. Jenks, 20 Wend. 96.

Mangam v. Village of Sing Sing (26 App. Div. 464, 50 N. Y. Supp. 647. Aff'd 164 N. Y. 560, 58 N. E. 1089), may be cited to the general proposition that the title to the land in the highway is in the adjoining owners.

b. Application in general.

There is but little diversity in respect to the general principles governing the construction of grants of land on a highway, but there is much contrariety of decision, in respect to their application, in particular cases, and in the construction of particular language, as bearing upon the point, whether the highway is, by the descriptive language of the conveyance, included in, or excluded from, the grant. It is generally conceded, that a grantor of land abutting on a highway may reserve the highway from his grant. But the presumption in every case is, that the grantor did not intend to retain the highway, and such reservation will not be adjudged, except when it clearly appears, from the language of the conveyance, that

question, reference may be made to a few of them which seem especially pertinent.

English v. Brennan, 60 N. Y. 609, involved the interpretation of a description in a deed which ran as follows: "Beginning at the southwesterly corner of Flushing and Clermont avenues, running thence westerly along Flushing avenue twenty-five feet; thence southerly at right angles to Flushing avenue seventy-nine feet nine inches to a point distant forty feet seven and a half inches westerly from the westerly side of Clermont avenue; thence easterly and on a line at right angles to Clermont avenue forty feet seven and a half inches to Clermont avenue; and thence northerly along Clermont avenue seventy-five feet to the

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such reservation was intended. But what language will be sufficient to exhibit such intent is the point of difficulty, upon which courts have differed.

As was said by Judge Gray in *Holloway v. Southmayd* (139 N. Y. 390, 34 N. E. 1047), "in the absence of language, which will plainly express the intention of a grantor to exclude from the operation of his grant the soil of the adjacent highway, it is just that doubts should be resolved in favor of his grantee; but in the application of the principle, there may be some danger to the stability of property rules."

In *Holloway v. Delano* (64 Hun, 27, 18 N. Y. Supp. 700, 28 Abb. N. C. 183), we find land described in a deed as follows: "Beginning at the corner of William Constable's land, on the north side of the Bloomingdale road, and running thence along said road north, 38 degrees east, 8 chains, 45 links," and thence after several courses to the place of beginning containing 19 acres, 3 rods, 5 perches, according to a map thereto annexed, etc. The court held that it was impossible to find in this description any intention of the parties that the fee of the highway was not to pass so as to overcome the presumption that the proprietor of land adjoining the public highway owns the fee to said highway to the center thereof. The court also said that it was clear that it was William Constable's land that was on the north side of the highway and not the point of beginning. That the point of beginning was the corner of Constable's land where it joined the land of the grantors and that according to the presumption aforesaid, Constable owned to the center of the highway, and therefore the description began at a point in the center of the highway.

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place of beginning." It will be noted that this description was very similar to the one now before us in that it commenced in the exterior line of a street and then ran "along" the highway. It was held that the description did not include title to the bed of the street, and Judge Andrews, writing the opinion of the court after recognizing the general rule that in a grant of land adjacent to a highway it is to be presumed that the grantor intended to convey his interest in the street, said: "But this presumption is rebutted if it appears by the description in the deed that he intended to exclude it from the conveyance. It is in all cases a question of intent to be determined by the description in the grant construed in view of the presumptions referred

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The other deed construed in the Holloway case (*supra*) described property as beginning at the corner of a field at the junction of the Bloomingdale road with the cross road that leads to Harlem, thus running along the Bloomingdale road south, 35 degrees west, 7 chains and 50 links," and thus by various courses to the place of beginning containing 42 acres and 5 perches according to a map, etc. The court in holding that that deed also conveyed to the center of the highway said: "Here the point of beginning is at the corner of a field at the junction of Bloomingdale road with the crossroads that lead to Harlem, and the presumption that the owner of that field owned to the center of both roads would apply, and the point of beginning is therefore the point formed by the center of the two roads. The line thence runs along the Bloomingdale road, and it seems to us clear that by such conveyance the fee of half of Bloomingdale road in front of the property described was included in the property conveyed, and the fee passed to the grantees in the deed." (See *Holloway v. Southmayd*, 64 Hun, 632, 18 N. Y. Supp. 703).

Judge Gray, in his opinion in the Court of Appeals (139 N. Y. 412, 34 N. E. 1052), affirming this case (*Holloway v. Delano* [*supra*]) said: "The General Term were of the opinion that no doubt existed in this case, whatever it may have been in *Holloway v. Southmayd*; but that, by the description, the grantees took the fee of the Bloomingdale road to its center line. While we concede that, under these descriptions, the doubt as to what was the intention of the grantors to convey, might be more

to. * * * We are to express our judgment on the case before us and determine whether Clermont avenue is or is not excluded from the grant to the defendant by the description in his deed. We are of opinion that it is, and that his lot is bounded by the sides, and not by the thread or center of Clermont and Flushing avenues. It is to be observed that the subject of the conveyance is on the face of the deed the land within the precise metes and bounds given. The point of beginning in the description is the corner of Flushing and Clermont avenues. This point is made necessarily by the intersection of the side and not of the center lines of the street. * * * The second course terminates at a point 40 feet $7\frac{1}{2}$ inches west-

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readily resolved in favor of the grantees; nevertheless, we prefer to place our affirmance of the General Term's judgment upon the grounds stated in the opinion in *Holloway v. Southmayd* (139 N. Y. 390, 34 N. E. 1047), decided herewith. In either case, we are inclined to the view that the descriptive monuments, or starting points, for the boundary lines cannot be fixed in the centre of the Bloomingdale road, without straining too much the language used. In Shaw's deed "the corner of Constable's land on the north side of the Bloomingdale road" seems to indicate the side of the road. If we read "on the north side," etc., as referring to the general situs of Constable's land, we should have to assume that Constable owned to the center of the road; which the proofs do not warrant us in doing. While, if we read these words as referring to the "corner," then, of course, we should have the same condition of things as in the *Southmayd* case. So, in the *Jaunceys'* deed, "the corner of the field at the junction of the Bloomingdale road," etc., are words which, when read according to their natural import, seem to describe the *situs* of the field and fix the starting point for the boundary line in the exterior line or side of the road bounding the field and not within the road itself." Three judges dissented and the fourth wrote a separate opinion which was not entirely in accordance with Judge Gray's opinion.

In *Holloway v. Southmayd* (139 N. Y. 390, 34 N. E. 1047), Judge Gray avoided deciding whether the conveyance in that case carried title to the center of the highway or not, by holding that "while the grantor may have retained the fee of the soil on the highway, he has but a naked, or barren

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erly from the westerly side of Clermont avenue, showing that in making the measurements the grantor had the side of the street in view. The next course is defined to be at right angles to Clermont avenue 40 feet 7½ inches to that avenue. If it had run to the avenue generally, a different question might have been presented; but, the precise length of the line being stated, this, in connection with the other parts of the description, seems to render it quite certain that it was to terminate at the side, and not in the center, of the street, and, if this is so, the course to the place of beginning was along the side of the avenue."

In *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, the court had before it for construction a description which read in part

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title, and that, in the event of the discontinuance of the public highway by act of law, the grantee and his successors in interest nevertheless will still be entitled to the perpetual enjoyment of certain easements, which were impliedly granted in relation to the open way lying in front of the land granted, and referred to as their boundary." The property in that case is bounded as follows: "Beginning on the north side of the Bloomingdale road at the corner of the lane leading down to Mr. Striker, and running along the same (the lane leading to Striker), north fifty-eight (58) degrees west ten (10) chains, sixty (60) links, and thence by various courses to the Bloomingdale road; thence along the said road north twenty-eight (28) degrees, thirty (30) minutes, thirty-nine (39) chains and seventy-five (75) links to the place of beginning, containing ten (10) acres 'according to a map thereto annexed.'" The grantors included in their grant all the easements, privileges, advantages and appurtenances belonging or in any wise appertaining to the land. Judge Gray, in his opinion, said: "Whatever the individual opinions we might entertain (and they may well differ), respecting the effect of the language in the conveyance to Clarkson to convey to him the fee of the soil to the center line of the Bloomingdale road, we prefer to place our decision upon the broad ground that Clarkson became vested with rights to private easements in the highway; which would perpetually exist as against the grantors and those deriving title from them; although the public easement in the road should become extinguished by its discontinuance as a public highway." Three judges dissented and a fourth wrote a separate opinion which was not entirely in accord with Judge Gray's opinion.

Where the beginning point of the description is at the corner of a field
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as follows: "Beginning on the northwesterly line of Carolina street at its intersection with the northeasterly line of Garden street; thence northwesterly along the northerly line of said Garden street; * * * thence southeasterly along the line of said block to the state line; thence southerly along the state line to Carolina street; and thence southwesterly bounding on Carolina street to the place of beginning." It was held that this description did not include title to the bed of Garden street; and, while it is true that such description was somewhat stronger in rebutting the presumption of a conveyance to the center of the street because the line was described as running "along the northeasterly line of Garden street," still the decision of the court was

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at the junction of two roads without limiting words, the commencing point is deemed to be at the junction of the two roads, which would mean at the center thereof, especially where the line running therefrom is along one of said roads.

Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33.

Where premises are in part described as bounded "westerly in front by Washington street," the title runs to the center of the street.

Wetmore v. Law, 34 Barb. 515, 22 How. Pr. 130.

Where property is described as beginning on the northerly side of a certain avenue at the southwesterly corner of a lot formerly owned by a certain person and running from thence northerly along said person's line, etc., by courses and distances back to the said avenue, thence easterly along said avenue to said person's land, the place of beginning, the grantee's title extends to the center of the said avenue.

Hudson River Tel. Co. v. Forrestal, 56 Misc. 133, 106 N. Y. Supp. 404.

Where property is described as bounded upon a turnpike road and this description is followed by a diagram which does not include the area of land to the center of the road, the presumption that the fee to the road bed was conveyed is not destroyed by such diagram.

Bird v. City of New York, 141 App. Div. 155, 125 N. Y. Supp. 1028.

The grantee in a conveyance which describes the property as bounded easterly "by the Bloomingdale road" is vested with the fee to the center of the road.

Mitchell v. Einstein, 105 App. Div. 413, 94 N. Y. Supp. 210.

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based on broader principles than mere consideration of said line, and which are applicable to the present case. For instance, it was said: "The grant under which the defendant claims title describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been and must control the other parts of the description; all the lines of the granted premises must conform to the starting point thus designated, so that while but for this designation of the commencement of the survey or boundary the lines along Garden street and Carolina street might, within the general prin-

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Where a description bounds premises by the "late line of Grove street," it means the former side line and not the center line of the street.

Sherman v. McKeon, 38 N. Y. 266.

In *Dunham v. Williams* (36 Barb. 136), the premises conveyed were bounded easterly by a road leading from Bedford to Brooklyn Ferry. No words were used indicating an intention to limit the eastern boundary to the westerly line of the road. The court held that the grant included the half of the road bed.

The description in *Herring v. Fisher* (3 N. Y. Super. Ct. (1 Sandf.) 344), was as follows: "The said lot number 9, begins at Great George street, at the road lately laid out between the lands of Stephen Bayard and Nicholas Bayard, and the said farm late of the said Elbert Herring, and runs along the said road north 37 degrees west to another road lately laid out through the said farm, late of the said Elbert Herring, parallel to Great George street; thence along the said last mentioned road, north 37 degrees east, 2 chains and 72 links to lot number 8, belonging to the said Cornelia Jones; then along the said lot number 8, south 53 degrees east, 12 chains, to Great George street, thence south 37 degrees, west, 6 chains and 8 links to the place of beginning." The court in holding that the fee of the road was included, said: "The owner of land on each side of a road or stream of water not navigable, is prima facie presumed to own to the center, subject to the public right of way; and in the construction of deeds, the general rule is, that where a deed or grant of land is bounded on a highway or runs along a highway, or when the boundary lines run to a highway, it conveys the land to the center of the road, if

ciples before referred to, be carried to the center of those streets respectively, they are necessarily confined to the exterior lines of the streets, so as to connect at this starting point. The precise point was decided by this court. *English v. Brennan*, 60 N. Y. [Mem.] 609."

In *Kings Co. Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 292, 41 Am. Rep. 361, the court considered a deed which conveyed land described as, "Beginning at a point on the southerly side of the Wallabout bridge road;" and which description, after running certain courses and distances, ran a certain distance "to the Wallabout bridge road," and from thence along said road a certain distance to the place of beginning. Again, with full recognition

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there be no words or specific description to show the contrary; and such words or specific description must be of a very decided and controlling character."

In *Matter of Ladue* (118 N. Y. 213, 23 N. E. 465), the conveyance in question described the premises as "Beginning at the northermost corner of the meadow belonging to Samuel Stilwell * * * and running thence south * * * five chains and ten links along the land of the said Stilwell intended for a road of two rods in width." The description then continues, embracing many courses and distances, and closes with the words "to the place of beginning, according to a survey of the same by Cassimer Th. Guerck, city surveyor, bearing date the fifth day of December, one thousand seven hundred and ninety-five; containing" a specified quantity land, "bounded on the south on the land of said Stilwell intended for a road of two rods in width; on the east on the lands of said Stilwell and northerly on the lands of said Stilwell and Robert L. Bowne as will appear by the aforesaid survey or map." After the habendum clause was the following covenant: "And the said Samuel Stilwell doth hereby, for himself, his heirs, executors, administrators and assigns covenant, promise and grant unto the said Samuel S. Bowne, his heirs, executors, administrators and assigns * * * that the road of two rods wide, as aforesaid, to run along and adjoin the southerly and westerly sides of the premises hereinbefore granted to Samuel S. Bowne, according to the aforesaid survey or map, shall be laid out accordingly and run from Bloomingdale road within one year from the date hereof and be ever kept open from that time." The court in holding that the conveyance passed title to the center of the street, said: "This is a conveyance according to a

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of the general principles invoked by the respondent, it was held that this description commencing on the side of the road rebutted the presumption of an intent to convey to the center; the court saying: "In the case before us, the starting point of the description is on the southerly side of the Wallabout bridge road, and the exact point of beginning is fixed by the reference to the lands of Skillman. The other lines are described by courses and distances, and the third course gives the length of that line in feet, to the road, which we think fairly imports that the measurement is to the side of the road, and the fourth course as along the road, etc., to the place of beginning."

In *Deering v. Reilly*, 167 N. Y. 184, 60 N. E. 447, it was

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map, upon which the land granted was represented as abutting upon a street, with a covenant that the street should be laid out within one year and ever kept open from that time. The question now arises, what is the extent of such a grant? Does it go to the margin or to the center of the road as laid down upon the map? This depends upon the intention of the parties as gathered from the terms of the deed, the situation of the land and, where there is doubt as to the intent, from the practical construction of the grantor and grantee and their successors in title. The construction, in case of ambiguity, should be most favorable to the grantee. The presumption is that a conveyance of land bounded by an existing street carries the fee to the center, because a narrow strip, such as half of a street, is much more valuable to the grantee than to the grantor and the parties are supposed to have so dealt with the property as to bring out its greatest value. What is the presumption when the deed treats the street as existing upon a map according to which the conveyance is made and provides that it shall be laid out of a given width within a given time? Would not the reason of the rule extend the presumption to that state of affairs also? Under such circumstances as between grantor and grantee, for the purpose of ascertaining the extent of the grant, should not the street be regarded as practically in existence at the date of the deed? Does not such conveyance, of itself, make a street, so far as the parties thereto are concerned, by appropriating the land to that purpose? Even if one part of the instrument refers to such land as "intended for a road," or street, should not that expression, as well as the covenant to lay out, when construed in connection with a map upon which the street appears as actually laid out, be held to refer to the development of the street for practical use by the removal of fences and obstructions? As between

held that a conveyance of lands described as "beginning on the northeasterly corner of Blackburry alley, on the southeasterly side of the Bloomingdale road," and running along said alley a certain distance, thence by other descriptions back to the Bloomingdale road, and thence along that road to the place of beginning, did not include any part of said road or alley in the conveyance. See, also, *Holloway v. Southmayd*, 139 N. Y. 390, 34 N. E. 1047, 1052.

It seems to me clear that the descriptions involved in the authorities cited are so similar in their important features to the one before us that they lead us with compelling force to the conclusion that the present description does not run to the cen-

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grantor and grantee a street is created when land, clearly defined as to extent and location, is devoted to that end by the grant, whether it is then in a condition to use as a street or not, although it would only be a street on paper until actually opened. Under such circumstances the parties might, with propriety, refer to it in the grant as an intended street, because not actually worked and used. Thus the references would be to physical conditions, not to title. This view is confirmed by the fact that the grantor was to have one year within which to lay out the road, as he would need time to remove trees, fences, etc., but not to pass title, or dedicate a street."

In *Greer v. New York Central & H. R. R. Co.* (37 Hun, 346), a certain parcel of land was described as situate on the west side of North Market street beginning in the southeast corner of the lot of the late John Fonday, Jr., and thence by courses and distances to a cellar wall and thence along said "cellar wall to the said North Market street, and thence northerly along said street about 32 feet, 8 inches to the place of beginning." In holding that the conveyance included to the center of the street, Judge Landon said: "The presumption of the law is that a conveyance of land bounded upon a highway carries the title to the center thereof. This presumption furnishes the rule of construction of such a conveyance unless the contrary intention is indicated by the language of the deed. The result of this rule is to resolve doubtful expressions in favor of the center line. A street is a monument, the same as a stone or tree, and its center is the terminus of the line extending to it unless its exterior line is indicated. If the point of beginning had been in the west side of the street there would be authority for the position that the street was excluded.

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ter of the street, unless their force has been weakened by later controlling decisions. I find none such. Counsel for the respondent thinks that he has found such in the cases of *Woolf v. Woolf*, 131 App. Div. 751, 116 N. Y. Supp. 104; *Van Winkle v. Van Winkle*, 184, N. Y. 193, 77 N. E. 33, and *Trowbridge v. Ehrich*, 191 N. Y. 361, 84 N. E. 297; and therefore I shall proceed to consider them briefly.

The *Woolf Case* seems to sustain his contention and, if controlling, would be an authority for his contention that his client's deed took him to the center of the street. That decision, however, was based on a construction of the *Trowbridge Case*, which in my opinion was erroneous, and to which I shall next refer.

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That the lot is on the westerly side of the street, however, does not exclude the street, for that indicates its location with reference to the street, without defining its exterior lines. Here the point of beginning is the south-east corner of the lot of Fonday. As that is not shown to be in the side or line of the street the same rules allow us to locate it in the center of the street. There is no hostile grant or claim asserted to the fee of the street, and the presumption carrying the title to the center is not repelled by hostile claims. 'To the street' goes to the center because the street, as before shown, is a monument. 'Along the cellar wall to the street' does not necessarily mean that the course ends with the wall; therefore we are at liberty to follow that course 'to the street,' i. e., to its center. The courses and distances yield to the monuments, unless the contrary intention is made to appear, and it is not in this case. 'Along the street' means along the center line. If it was intended to exclude the street, it would have been easy to have employed words clearly indicating that intent, as 'along the west side of the street,' 'to the west side,' 'bounded against' or 'abutting upon,' or some words showing that the entire *corpus* of the street was excluded." The court also held that a conveyance bounding property on the east by North Market street carried to the center of the street.

Where property is described as fronting on a certain street, the grantee has title to the center of the street, but where the western boundary of a lot is given as the east line of a certain street, the grantee's title does not include the street.

Wallace v. Fee, 50 N. Y. 694.

The description in the Trowbridge Case ran as follows: "Beginning at a point where the northerly line of One Hundred and Sixty-Third street intersects the easterly line of Stebbins avenue; running thence easterly along the northerly line of One Hundred and Sixty-Third street 30 feet; thence northerly and parallel with Stebbins avenue 128.71 feet; thence westerly and parallel with One Hundred and Sixty-Third street 30 feet; and thence southerly and along the easterly line of Stebbins avenue 128.71 feet to the point or place of beginning." 191 N. Y. 364, 84 N. E. 298. It was held that this description indicated an intention not to include the fee of the street because the grant dealt with the boundary lines rather than the center lines

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c. Intent of parties.

In all cases, the question as to whether the title to the street passes, is one of intent of the parties to the conveyance.

Watson v. City of New York, 67 App. Div. 573, 73 N. Y. Supp. 1027. Aff'd 175 N. Y. 475, 67 N. E. 1091.

Whether or not the fee of an adjacent street passes by a conveyance of abutting property is a question of intention, and the courts are justified in looking at the situation of the property and the contemporaneous acts of the parties, including the conveyances they have made of adjoining property, as well as the description contained in the conveyance in question, to determine what was the intention of the parties making the conveyance. If the property is conveyed by metes and bounds which expressly exclude the street, as where a piece of property is expressly bounded upon the side of a street, so that by no construction can the fee of the street be included, the court is not justified in giving to such description a construction which would convey property outside of the limits of the property expressly conveyed. But where there exists an ambiguity, or there are two descriptions which are to some extent contradictory, by one of which the fee of the street would be included, and the other, standing alone would indicate an intention to exclude the fee of the street, effect will be given to the description which, from the contemporaneous acts of the parties and the situation of the property as it existed at the time of the conveyance, appears best to carry into effect the intention as thus ascertained. (*Potter v. Boyce*, 73 App. Div. 383, 77 N. Y. Supp. 24. Aff'd 176 N. Y. 551, 68 N. E. 1123.) The description of the property which

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of the streets, and to this extent the decision confirms the one which we are now making. In the course of his opinion Judge Haight said, "Had she [the grantor] commenced at the intersection of the two streets and thence ran along the street it would have been apparent that she intended to convey to the center of the street" (191 N. Y. 365, 84 N. E. 298); and it was this expression which was made the basis of the decision in the Woolf Case. It is to be noted in the first place that what was said was purely a dictum, but in addition to this the terms of description suggested by way of illustration were entirely different than those which were and are being construed in the Woolf Case and the present case. In both of these cases the

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gave rise to the controversy in that case was as follows: "All that certain piece or parcel of land situate, lying, and being at Manhattanville, in the ninth ward of the city of New York, commencing at the corner of the Bloomingdale road and Hamilton street, and running thence southeasterly along the northeasterly side of said Hamilton street, about five hundred and thirty-five (535) feet to Phineas street; thence northeasterly along the northwest side of said Phineas street, about two hundred and forty-six (246) feet to Blackberry alley; thence northwesterly, along the southwesterly side of said Blackberry alley, about five hundred and thirteen (513) feet, to the Bloomingdale road; thence westerly along the southeast side of said Bloomingdale road, about two hundred (200) feet, to the place of beginning,—the said land being known and distinguished in a map of Manhattanville as surveyed and laid out by Adolphus Loss, dated the 15th day of September, 1806, by lot numbers 10 to 42 inclusive on Hamilton street, numbers 19 to 27 inclusive on Phineas street, numbers 37 to 51 inclusive on Bloomingdale road." As the parties owned the fee of Bloomingdale road and Hamilton street, and the commencing point was at the corner of these streets, the court held that that point was at the intersection of the center line of those two streets so that the only question was whether the description included the westerly half of Phineas street, the uncertainty arising solely from the insertion in the description of the provision that the line ran along the sides of these streets instead of along the streets. The situation in that case when the conveyance was made was that three persons owned a tract of land as tenants in common which they had caused to be surveyed and laid out in lots and blocks with intervening streets. These streets were not at the time of the conveyance actually existing streets. The owners of the property including

starting point is concededly at the intersection of the exterior lines of two streets. In the illustration which was used in the Trowbridge Case there was assumed a starting point at "the intersection of the two streets," and such point would be formed by the intersection of the two center lines; and hence the controlling point of commencement would be in the center of the street instead of at the side thereof.

In the Van Winkle Case the conveyance was of a certain lot, and the commencing point of the description which was employed was stated in one conveyance as being "at a stake by the fence on the crossroad leading from Harlem fifty links from the southeastern corner of the fence," and in another conveyance as

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the fee of these streets concluded to divide certain portions of the property so that several blocks should be held in severalty; and, to carry out what appears to have been that intention, two of the tenants in common united to convey to Buckley one block of land, and Buckley and one of his cotenants united to convey to another cotenant an adjoining block of land. Separating those two blocks, there was a street laid out upon the map known as Phineas street. To the tenant in common who received a conveyance of a block on the east side of Phineas street it was conveyed by a description which would include the easterly half of Phineas street. The above was the description in the deed which conveyed to Buckley the block on the west of Phineas street. The court, in holding that the above description included to the center of the street, said: "There could be no possible object in these grantors retaining to themselves an undivided interest in the fee of one half of Phineas street, after having on the same day conveyed to another of their cotenants their interest in the fee of the other half of Phineas street; and I think the fact of their coupling with the description of the property a statement that what was intended to be conveyed was this whole block of ground thus surrounded by these streets shows that it was the intention to include the fee of the streets, although the formal description by metes and bounds, if standing alone might be said to exclude it. The property is sold entirely by reference to the map. But for the map, it would be impossible to locate any of these streets; and by a reference to the map, and selling it by the map, it seems to me clear that the fee of these streets was included."

Whether a grant of lands bounded by a street, highway or running stream, extends to the center of such street, highway or stream, or is

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being "at a stake by the fence on the public crossroad, the corner of Mr. Jauncey's land," and the determination whether the conveyance ran to the center of the highway largely turned on the effect of this statement of the point of commencement of the description. The case was regarded as a close one, and two principles which do not exist in this case were invoked for the purpose of carrying title to the center of the road. The first one was that the starting point was of uncertain location, and that therefore the other lines in the description were to be considered in determining the intent of the parties, and that doing this such other lines carried the description "to the public road and thence south along the road to the place of beginning," and therefore,

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limited to the exterior line or margin of the same, depends upon the intent of the parties to the grant as manifested by its terms, so that the question as to the true boundary is, in all cases, one of interpretation of the deed or grant. Learned judges have contended, and in some of the States it has been substantially held, that in such cases the question of boundary is rather one to be determined by reasons of public policy than by the intent, determined by the ordinary rules of construction, although in no instance is it claimed that a grantor may not restrict his grant so as to exclude the soil of the street, highway or stream; the most that is claimed by any is that nothing short of an intention, expressed *in ipsius verbis*, to exclude the soil in such cases should exclude it. The rule, however, in this State is well settled, that no particular words or form of expression is necessary to restrict the grant to the exterior line of a street or margin of a stream, and exclude the soil of each; but that while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, such presumption may be overcome by the use of any terms in describing the premises granted, which clearly indicate an intent not to convey the soil of the street or stream. It is not sufficient to exclude from the operation of the grant the soil of a highway, *usque ad medium filum*, that the grant is made with reference to a plan annexed, the measuring or coloring of which would exclude it, or by lines and measurements which would only bring the premises to the exterior line of the highway, or that they are bounded generally by the line of the highway or along the highway, or by any similar expressions.

Whites' Bank of Buffalo v. Nichols, 64 N. Y. 65.

under general principles, included title to the middle of the street. The second point was that a state or monument placed upon the boundary of a highway is not necessarily to be regarded as fixing the starting point in the description at the side instead of the center of the street because of the impossibility of locating such monument in the bed of the highway, and that therefore such a point of commencement, under such circumstances, would not be controlling upon the other lines of description.

Our conclusion, therefore, is that the conveyances in ques-

When conveyance includes bed of highway.—Continued.

Deeds conveying property bounded by a highway, water course or public street, are to be construed in the light of the intent of the parties, and not upon principals of public policy merely. If the terms of the deed be clear, this intent must be ascertained from the terms of the deed itself; if the terms of the deed be ambiguous, then the intent of the parties may be shown by evidence aliunde, and the situation and condition of the parties and of the subject-matter may be considered in determining such intent.

Stevens v. City of New York, 46 N. Y. Super. Ct. (14 J. & S.) 274.

While it is an established inference of the common law that a conveyance of land bounded by an existing street carries the title to the center, still this inference is not controlling. The question whether the title passes to the center of a stream or highway upon which lands are bounded is one of intent. This intent is to be gathered from the description of the premises, in connection with other parts of the grant and by reference to the situation of the lands, and the condition and relation of the parties to the lands conveyed and to other lands in the vicinity; and, if an intent to exclude the highway or stream appears by the terms of the grant, as interpreted by the surrounding circumstances, the title does not pass. (*Dexter v. Riverside & Oswego Mills*, 61 Hun, 619, 15 N. Y. Supp. 374.) The description of the property in question in that case designated the place of commencement as a point in the north line of block number 163, fifty feet easterly from the northwest corner of said block being the northeast corner of land owned by Edgar M. Baker and running thence along Broadway fifty feet to a stake. The description of the property in Mr. Baker's deed referred to, commenced at a point on the northwest corner of said block at the intersection of Broadway and Second street, and running thence easterly along the south line of Broadway, fifty feet to a stake. The northeast corner of Mr. Baker's lot was

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tion carried title to the exterior and not to the center line of Walnut street, and that the orders appealed from were erroneous and should be reversed, and the award be directed to be paid to the appellants, with costs in all courts.

CULLEN, C. J., and GRAY, CHASE, HOGAN, and MILLER, JJ., concur. WILLARD BARTLETT, J., absent.

Ordered accordingly.

When conveyance includes bed of highway.—Continued.

therefore on the southerly line of Broadway, and that corner was also the corner of the lot in question. The court in holding that the description excluded the street, said: "The question in this case is simply one of intent. Was it the intent of the parties to the plaintiff's deed that the plaintiff should take title to the center of the street? We think not. As we have seen, the point at which the plaintiff's premises were to commence was in the southerly line of the street. That it was the intent of the parties that they should extend along the southerly line of the street, rather than along the center, is rendered quite obvious from the fact that the starting point in the description was in the south line of the street. Manifestly they could not commence at that point and follow the description in the deed, and still include one-half of the street. The description of the premises, interpreted in the light of the surrounding circumstances, tends to show quite clearly that such was not the intent. We think the court properly held that the plaintiff's title extended only to the south line of the street."

Although the highway is in one sense a monument, it is regarded as a line, and the center of the highway in such case is regarded as the true boundary indicated, as is the case when a tree, stone or other similar object is designated as a monument; the center, in the absence of any other indication, is regarded as giving the true boundary or limit of the grant. But when the words clearly indicate an intention to exclude from the operation of the grant the soil of the highway, it is equally well settled that it does not pass, and the grantor retains the title, subject only to any easement which may exist in the public or in the grantee of the adjacent lands.

Whites' Bank v. Nichols, 64 N. Y. 65.

The court in Putzel v. Van Brunt (40 N. Y. Super. Ct. (8 J. & S.) 501), in holding that a description, which carried the boundary to a certain

When conveyance includes bed of highway.—Continued.

monument on the side of a road and thence along the side of the road to another monument at the side of the road, included the road to the center, said: "It is a familiar rule that the grantee of a lot bounded on a street prima facie takes to the center of the street, and there must be language expressly excluding the street to prevent the grant having this effect. * * * The intention of the several parties is to be ascertained not only from the language in the description of the deed itself, but must ever have reference to relative extrinsic facts. Those facts may consist of co-temporaneous writings, relating to the same subject; by reference in this case to the deeds and circumstances relating to the premises described in them, which brought the title down to Barclay. As a clue to this intention and the import or effect of conveyances, we are permitted to look to the undisturbed use of the right contested, on the one side, and the unqualified acquiescence, on the other, down to the time of the purchase of the premises by the defendant. * * * It was impracticable and unusual to place the monuments "K" and "19" elsewhere than on the side of the road; while it is apparent that the measurement of land extended to the center. * * * It is well known that in the rural districts it is the custom in the survey of lands to mark courses and distances by artificial monuments, and in case the boundary is made by the highway these monuments are placed on the side of the road between the exterior line enclosing the street and the road bed, while the quantity of land conveyed extends to the center. Where, therefore, the road is the limit and boundary the expression is both natural and common "to the side and along the side," thereby defining in common parlance that portion of the road lying between the exterior limit and the center."

A conveyance of a lot bounded on a piece of ground laid out upon a map as a street and called a street but which is not in fact a public street or highway, carries the grantee to the middle of the street. (*Bissell v. New York Central R. R. Co.* 23 N. Y. 61.) The court after setting forth the legal presumption that if it was a public street, such a conveyance would carry to the center of the street, said: "The rule seems to be based upon the supposed intention of the parties, and, it seems to me, upon a very reasonable intention. The idea of an intention in a grantor to withhold his interest in a highway to the middle of the street, after parting with all his right and title to the adjoining land, ought never to be presumed: and all the cases hold that, in such a case, it requires some declaration of such an intention in the deed to sustain such an inference. There is no reason for presuming a different intention in a case like the present. The grantor, Mumford, intended this as a street, and gave it the name of Erie street, and, as regards his grantees in these deeds, he dedicated it as a street, according to all the cases, whether the public ever accepted it as such or not. It was as between him and his grantees, a street which they had a right to use as such, as soon as these conveyances were made

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by him. * * * If, as regards these grantees, it is a street, and if, in his conveyances, he intended it as a street, I am not able to see why the legal inference, as regards his conveyance, is not the same as if it were a public highway. There is no more reason to presume the intention in the grantor in such a case to withhold his interest in the road to the center of it, after conveying all his right and title to the adjoining lands, there would be were this to all intents and purposes a public street. The question in each case becomes one of presumed intention arising upon the conveyance itself; and I am not able to perceive how it is possible to deduce a different intention in one case from that which, the law has settled, shall be inferred in the other. Did not Mumford, when he caused these lots to be laid out on either side of this street, and this street designated, named, and put down on the map, and these lots numbered, and when he conveyed these lots to purchasers with a reference to this allotment and survey, intend that this should be a street, by the name of Erie street? No one will pretend that he did not. Did he not, by selling these lots to purchasers with reference to this map and street, and conveying the lots to them on both sides of the street, thereby, so far as these grantees are concerned, dedicated this as a street? No one can claim to the contrary. All the cases affirm it. Did he not, then, in making these conveyances to these purchasers, intend to convey lands upon a street so far as the grantees in these deeds are concerned, and did not these purchasers so understand it? No one can doubt it for a moment. If such was the intention of the parties to these conveyances, then I am not able to perceive why the conveyance does not carry with it the usual legal inference that a conveyance bounded by a highway does, to wit, that it carries with it the fee to the center of the road."

The court in *Tag v. Keteltas* (48 N. Y. Super. Ct. (16 J. & S.) 241), held that the rule that every grant is to be construed as running to the center of the road adjoining, unless there are words of exclusion, is controlled by the rule of intent. In that case the description was: "beginning at a point 12 feet from the east corner of land now belonging to Thomas Cadle, at a road 33 feet wide; thence along the said road 30 chains and 24 links to * * * the commons," etc., thence by courses and distances to the place of beginning. The "east corner of land now belonging to Thomas Cadle" was on the side of the road as shown by the conveyance to Cadle. Furthermore, the property contained the acreage called for exclusive of the road. The court held that it was the intention of the parties to exclude the highway. The court in referring to the rule above stated said: "The law abhors the infinitesimal interests and perplexing complications that would result from the opposite construction, whereby land would be unconveyed which is in itself valueless to the grantor and injurious to the grantee. There is nothing peculiar or mysterious in a street or a stream as a boundary. It is the same with a stake or a tree.

When conveyance includes bed of highway.—Continued.

Where the lines run to either of these, or to any other fixed point, it takes to the center. The law makes such boundary lines contiguous or coterminous. If we were limited to the description of this deed alone, applying the said rule, we must decide that this conveyance included the road to the center thereof. But in this description there are no monuments which can determine the northerly and southerly lines of said description, and no authority can be found which under such circumstances holds that the three chains running from the center of the road can be extended so as to be three chains plus one half the road. We have not, therefore, a case coming absolutely within the principal above referred to. But even if we had, that rule is not an inflexible rule, and it is controlled by another rule—the rule of intent, which has been designated the pole-star of construction. It is more than the pole-star. The doctrine that the intent must govern is like the law of gravitation. It pervades the entire domain of land, as that does the material universe. The star is often observed; the law is ever operative. And whatever conclusion may be drawn from the description itself, the intent of the parties must govern; for every instrument, however solemn or however ordinary, must be controlled by that principle.”

In *Van Winkle v. Van Winkle* (184 N. Y. 193, 77 N. E. 33), the property was described as beginning “at a stake by the fence on the cross-road leading from Harlem, 50 links from the southeastern corner of the fence.” There was no specification of the fence by the side of which there was a stake. The property which the parties intended to convey was on the northerly side of the cross road. The stake was 50 links from the southeastern corner of the fence. The southeastern corner of the fence of necessity was upon the other side of the road. The direction of the stake therefrom was not given. The court held the description in this regard was ambiguous, and it therefore considered the description of the other line for the purpose of determining the intent of the parties. The next to the last line returned the boundary to the public road “and thence south along the road to the place of beginning.” It was therefore presumed that the intention of the grantors was to convey the title to the center of the public road.

In *re Opening of Cathedral Parkway* (20 App. Div. 404, 46 N. Y. Supp. 832, aff'd 155 N. Y. 638, 49 N. E. 1100), the owner of a tract of land which on a map thereof was divided into four lots, made a conveyance of two of the lots, the easterly boundary line of lot number one and westerly boundary line of lot number 2 being the Bloomingdale road. The deed described lot number 1 as beginning at the northwest corner of lot number 3, thence north on the North River by various metes and bounds to the northerly boundary of the lot; “thence south 61 degrees east, 6 chains and 60 links along land of said Nicholas De Peyster (the grantor), to the

When conveyance includes bed of highway.—Continued.

road or highway"—being the Bloomingdale Road aforesaid. Thence south, nine degrees west, eight chains and four links, along the road, to lot number three;" thence north to the river and place of beginning,—containing five acres and $\frac{42}{100}$ of an acre. The description of lot number 2 was as follows: "Beginning at the northwest corner of lot number four, opposite the southeast corner of lot number one on the east side of Bloomingdale road, and running thence north, nine degrees east, seven chains and eleven links, along the road aforesaid, to the land of James De Peyster; thence south, eighty-one degrees east, along the said land and land of James De Peyster, eighteen chains and twenty-two links; thence south, sixteen degrees west, along land of the said James De Peyster, nine chains and thirty links, to the northeast corner of lot number four; thence north, seventy-six degrees west, sixteen chains and sixty-seven links, along lot number four, to the road and place of beginning,—containing fourteen acres and eleven hundredths of an acre." The court held that the description of lot number one clearly included the fee of the westerly half of the roadway. The doubt as to the lot number 2 carrying the fee of the road was caused by the clause "Opposite the southeast corner of lot number one on the East side of Bloomingdale road." In discussing this, the court said: "If these words 'on the east side of Bloomingdale road' should be construed to apply to lot number 1, as the punctuation would seem to indicate, there was an evident mistake, because lot number 1 is not on the east side, but on the west side of the road. Taking the whole description together, it would appear that the words 'on the east side of the Bloomingdale road' were intended to convey a general description of lot number 4 rather than of lot number 1 or number 2, to indicate that lot as being a lot on the east side of the road. By transposing those words so that the description would read, 'Beginning at the northwest corner of lot number 4, on the east side of Bloomingdale road, and opposite the southeast corner of lot number 1, and running thence along the road,' it would seem to be the description that was intended. This would manifestly refer, not to the northeast corner, which was on the east side of the road, but to the lot itself, as being so situated. The lot thence ran along the road, not along the side of the road,—a description which would clearly indicate an intention to convey to the center of the road, rather than to limit the grant to the easterly side; and then, being carried by various metes and bounds to the northeast corner of lot number 4, the description runs thence along lot number 4, to the road and place of beginning, again making the road a boundary of the lot rather than the side of the road. We must also consider the fact that by this deed the grantor conveyed the land upon both sides of this road. There is nothing to show any intention or necessity of reserving the fee of the roadway. He had parted with the land upon both sides of the road by one deed, and the west half of the road went without there being any language in the deed to indicate an intention to retain any interest in the east half of the road abutting on the property

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granted, and without expressly bounding either plot by the side of the road, but in both cases using the road itself as the actual boundary of each separate plot. The reference in the deed to the plan or map of the lots does not indicate an intention to exclude the bed of the road. We have therefore come to the conclusion that, by this conveyance, the fee of the Bloomingdale road, upon which lots numbers 1 and 2 abut, was conveyed to the grantee."

Principles of great public convenience forbade that one should be the owner of a farm, and another of a road or stream running through it. The practical inconvenience of a contrary rule has led to this construction uniformly, unless where it expressly appears that the parties intended the contrary.

Miner v. City of New York, 37 N. Y. Super. Ct. (5 J. & S.) 171.

Hammond v. McLachlan, 3 N. Y. Super. Ct. (1 Sandf.) 323.

And in *Mott v. Mott* (68 N. Y. 246), it is said: "An intent to exclude the highway or bed of the stream will not be presumed, but must appear from the terms of the deed as interpreted and illustrated by the surrounding circumstances." And, further: "It depends upon the intent of the parties, to be gathered from the description of the premises, read in connection with the other parts of the deed, and by reference to the situation of the land and the condition and relation of the parties to those and other lands in the vicinity, whether the grant extends to the center of the road or stream. This is the recognized rule of interpretation, and it is a question of interpretation and intent." In that case, the subject-matter presented was whether, in a conveyance adjoining a lane, the lane was to be included within a description bounding thereon, and also whether a conveyance to the center of a certain other private road upon which other lands involved in the action were bounded, was intended, and it was held that, as the lane was a private way of which use could be made by the grantor, the rule was different than that applicable to a public street, and an intent was deduced from the instrument and surrounding circumstances to exclude it from the operation of the grant. As to the highway, the deed, although bounding thereon, assumed to reserve an easement in the roadway to the grantee in the deed, and it was held that reserving such rights evidenced an intent on the part of the grantor to retain title to the road, subject to an easement of the grantees therein.

d. Starting point at intersection of highways.

A street given as a boundary, is to be considered as a line, and not as a space, unless the contrary intention clearly appears on the face of the deed. (*Hammond v. McLachlan*, 3 N. Y. Super. Ct. (1 Sandf.) 323.) The property in that case is described as "beginning on the corner of Catharine and Bank streets, thence westerly on Bank street 325 feet; thence

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northerly, and parallel to Catharine street, 190 feet to Scott street; thence easterly on Scott street 325 feet to Catharine street, thence southerly on Catharine street, 190 feet to the place of beginning." The court held that such a description included to the center of the street even though it was city property.

e. Starting point at intersection of exterior lines of highways.

Descriptions beginning at the intersection of the exterior lines of two streets exclude the highway. *De Baum v. Pardee*, 139 N. Y. Supp. 1077.) This case deals with the same conveyance construed in *Tietjen v. Palmer*, *infra*, where the description is set forth in full. The court in the *De Baum* case follows the decision of the court in the *Tietjen* case on this point to the effect that the conveyance did not include the bed of the street.

The presumption that a conveyance bounded by or upon a street embraces a fee to the center thereof not being *juris de jure*, it may be overcome. (*Tietjen v. Palmer*, 121 App. Div. 233, 105 N. Y. Supp. 790.) The property conveyed in that case was described as follows: "Beginning at the southeast corner of Monticello and Green streets, running thence southerly along Green street five hundred (500) feet; thence easterly ninety-seven (97) feet and nine (9) inches to ground now or late of Mrs. Reyerson; thence northerly along the same five hundred (500) feet to Monticello street; thence westerly along Monticello street one hundred and four (104) feet to the point or place of beginning, be the same dimensions more or less." The court held that as the parcel in question lay to the south and east, that therefore the "southeast corner of Monticello and Green streets," as a starting point excluded the land in those streets.

The presumption is that a conveyance of land bounded by an existing street carries the fee to the center, because a narrow strip, such as half of a street, is much more valuable to the grantee than to the grantor, and the parties are supposed to have dealt with the property as to bring out its greatest value. But such presumption can be rebutted by the use of such words as necessarily exclude the street from the description of the premises conveyed, as where the property is bounded by an exterior line of a street, or the description commences at a point in an exterior line and thence runs along the line or side of the street. (*O'Leary v. City of Glens Falls*, 128 App. Div. 683, 112 N. Y. Supp. 932.) The description construed in that case was as follows: "Commencing at the northeasterly corner of Grove avenue and Davis street, and running thence north sixty-four degrees and forty-five minutes east, along the north line of Grove avenue, fifty-five feet; thence north twenty-seven degrees west, one hundred and seventy feet, thence south sixty-four degrees and forty-five minutes west, fifty-five feet, to Davis street; thence south twenty-seven degrees

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east, one hundred and seventy feet, along the easterly line of Davis street, to the place of beginning." In holding that the case was not within the authorities which require presumption that the plaintiff's grantor intended to convey to the center of the street, the court said: "It will be observed that there is nothing in the deed in question which denotes any intention to buy or sell any land not expressly included within the courses and distances therein given, and it is undisputed that those limits do not include any part of the streets. The plaintiff's lot is not bounded by, upon, or along Davis street. It does not run to that street. The street is not made a monument or mere mathematical line, so as to carry the grant to the center. It will be observed that the commencing point is necessarily at the intersection of the northerly line of Grove avenue and the easterly line of Davis street. That is the only visible northeasterly corner, and that it is the corner intended is apparent from the fact that it is the one from which the boundary upon the southerly side and the boundary upon the easterly side extends."

The description of the property in *Trowbridge v. Ehrich* (191 N. Y. 361, 84 N. E. 297), was as follows: "Beginning at a point where the northerly line of One Hundred and Sixty-third street intersects the easterly line of Stebbins avenue; running thence easterly along the northerly line of One Hundred and Sixty-third street 30 feet; thence northerly and parallel with Stebbins avenue 128.71 feet; thence westerly and parallel with One Hundred and Sixty-third street 30 feet and thence southerly and along the easterly line of Stebbins avenue 128.71 feet to the point or place of beginning. "The court in its opinion said: "We readily concede the correctness of the contention that where an owner of real estate files a map of his premises in the office of the register, upon which is laid out streets and avenues, either existing or proposed, and deeds with reference to such streets and avenues, running to such streets and along such streets it will be construed to have been the intention of the grantor to convey to the center of such streets or avenues. But this case is distinguishable. The plaintiff has been careful to commence her description of the property conveyed at the intersection of the northerly line of One Hundred and Sixty-third street with the easterly line of Stebbins avenue. The commencing point, therefore, is at the external line of the street and continues easterly along the northerly line of the street. Had she commenced at the intersection of the two streets and thence ran along the street it would have been apparent that she intended to convey to the center of the street, but as we have seen, she has placed the boundary at the northerly line, thus indicating an intention not to include the fee of the proposed street. It is true that she has executed this deed in accordance with the provisions of the map filed by her, upon which she designated this space as a street and by reason thereof the grantee acquired an easement in it of light, air and access, but not the fee." But where the

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grantor by a subsequent clause, states that the conveyance is to include all the right, title and interest which he has to that portion of the avenue lying in front of adjacent to said property to the center of said avenue as laid down on the map thereof an intent is thus indicated to convey to the center of the street.

One of the deeds construed in *Wetmore v. Law* (34 Barb. 515, 22 How. Pr. 130), was described as "beginning at the corner formed by the intersection of the easterly line of Greenwich street with the northerly line of Chambers street" then follows a line southeasterly along the line of Chambers street, then a line perpendicular to Chambers street, then a line "parallel with that of Chambers street 109 feet to the said easterly line of Greenwich street, and then southwardly along the same 79 feet and 8 inches to the place of beginning." The court held that this description did not carry to the center of the street.

The description in the deed construed in *Deering v. Reilly* (167 N. Y. 184, 60 N. E. 447), was as follows: "Beginning on the northeasterly corner of Blackburry Alley, on the southeasterly side of the Bloomingdale Road, and running along said Blackburry Alley one hundred and twelve feet; thence along the line of lot number ninety-four one hundred feet to Manhattan street; thence along said Manhattan street one hundred and three feet to the corner of Bloomingdale Road and said Manhattan street; thence along the Bloomingdale Road one hundred feet to the place of beginning." The court in holding that this description excluded the land in Bloomingdale Road, said: "Blackburry Alley was laid out subsequently to the opening of the Bloomingdale Road and runs easterly therefrom. The starting point in this description being 'the northeasterly corner of Blackburry Alley on the south-easterly side of Bloomingdale Road,' no part of the Bloomingdale Road, or of the alley, was included in the conveyance. The northeasterly corner of Blackburry Alley must, of necessity, be deemed to be where its northerly line intersects the easterly line of the Bloomingdale Road. Then, again, the third course given along Manhattan street, 'one hundred and three feet to the corner of Bloomingdale Road and said Manhattan street,' shows that the land in Bloomingdale Road was excluded."

In *English v. Brennan* (60 N. Y. 609), the court held that the highway was not included in the following description: "Beginning at the south-westerly corner of Flushing and Clermont avenues, running thence westerly along Flushing avenue twenty-five feet, thence southerly at right angles to Flushing avenue, seventy-nine feet nine inches to a point distant forty feet seven and a half inches westerly from the westerly side of Clermont avenue, thence easterly on a line at right angles to Clermont avenue, forty feet seven and a half inches, thence northerly, etc., to the point of beginning."

When conveyance includes bed of highway.—Continued.

In *White's Bank v. Nichols* (64 N. Y. 65), the description was stated as beginning in the northwesterly line of the street, intersecting the north-easterly line of another street as the same appeared upon a map laying out the streets and filed prior to the execution of the conveyance. It was held that the true interpretation of the deed carried title only to the exterior line of the street, and did not embrace any part of it.

In *Mead v. Riley* (50 N. Y. Super. Ct. (18 J. & S.) 20), the starting point is at the corner formed by the intersection of the easterly line of Broadway, with the northerly line of Ninety-first street to Tenth avenue; thence north along the westerly line of Tenth avenue to Ninety-second street to Broadway; thence south along the westerly line of Tenth avenue to Ninety-second street; thence westwardly along the southerly line of Ninety-second street to Broadway; thence south along the easterly line of Ninety-second street to Broadway to the point of beginning. The court held that the highway was not included.

A description in a deed which begins at a point formed by the intersection of the southerly line of M. street and the westerly line of D. street, thence running westerly along the southerly line of said M. street, etc., excludes the land in the street.

Kehres v. City of New York, 162 App. Div. 349, 147 N. Y. Supp. 825.

1. Starting point on side of highway.

Where property is described as commencing at a point which is at the external line of the street and the boundary continues along such external line, the fee of the street is not included.

Trowbridge v. Ehrich, 191 N. Y. 361, 84 N. E. 297.

Where a conveyance describes a parcel of land as beginning at a point on the east of a certain road and thence along the east side of said road a certain number of feet, and the description is continued until the line is brought to the place of beginning, the fee of the road is not included. .

Blackman v. Riley, 138 N. Y. 318, 34 N. E. 214.

Where property conveyed is described as beginning at a certain stake by the side of the road, the property to the center of the road does not pass to the grantee.

Johnson, ex dem. Yates v. Hatheway, 15 Johns. 447, 8 Am. Dec. 263.

A conveyance which fixes the point of commencement of the property conveyed "at the intersection at the northerly side of the Eastern Boulevard with the Westchester Creek" shows a plain intention to exclude the fee of the street.

Matter of Opening of Tremont Avenue in the city of New York, 71 Misc. 480, 130 N. Y. Supp. 510.

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In *Patten v. New York Elev. R. R. Co.* (3 Abb. N. C. 306), the description began at a point on the westerly side of Greenwich street and thence "running along" said street, etc., by courses and distances to the place of beginning. The court held that the fee of the street was not included, as the termini of the boundaries were stated to be on the side of the street.

In *Kings County Fire Ins. Co. v. Stevens* (87 N. Y. 287, 41 Am. Rep. 361), the land was described in the deed as "beginning at a point on the southerly side of the Wallabout bridge road" and running thence southerly and after various courses and distances "north 48 degrees, 9 minutes west to the Wallabout bridge road, and from thence along said road to the place of beginning." The court held that the grant did not include the highway to the center but that the land was bounded by the southerly side of the road of the highway.

In *Jacquemin v. Finnegan* (39 Misc. 628, 80 N. Y. Supp. 207), the property was described as commencing at a point on the northerly side of Bleecker street, and running thence by various courses and distances to another part on the northerly side of Bleecker street; thence westerly along the northerly line of Bleecker street to place of beginning, said lot being 40 feet front and rear and 120 feet deep. The property was 120 feet deep without including the street and as the description commenced at a point on the side of the street and one course thereof ran along the side of the street, the court held that the conveyance did not include the land to the center of the street.

The property in question in *Pell v. Pell* (65 App. Div. 388, 73 N. Y. Supp. 81, aff'd 169 N. Y. 607, 62 N. E. 1099), was described as "beginning on the East side of Greenwich road at the northwest corner of the land of Lewis Scott, directly opposite to the southeast corner of the land above conveyed" etc., by courses and distances returning to the place of beginning, it was contended that the words "beginning on the east side of Greenwich road" necessarily excluded the fee to the highway, but as the court stated these words were followed by another clause which must be given force and effect in locating the point of commencement of the description. "The southeast corner of the land above conveyed," referred to in that clause, had already been shown to be in the center of the highway. It was therefore necessary only to locate the northwest corner of the land of Lewis Scott and this also was found to be a point in the center of the highway. It was therefore held that the property above described included to the center of the highway.

In *Kennedy v. Mineola H. & F. Traction Co.* (77 App. Div. 484, 78 N. Y. Supp. 937, aff'd 178 N. Y. 508, 71 N. E. 102), the description in the deed was as follows: "Beginning at a point on the northeasterly side of

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the Babylon turnpike (so called) at a point intersecting the land of J. Tompkins;" and from that point the boundary line proceeds by courses and distances "until it comes to the northeasterly side of the Babylon turnpike." Then in three courses each time stated to be "thence along the said turnpike" etc., "to the point or place of beginning." Then follows the amount of acreage and this clause: "Together with all the right of the grantor in and to said Babylon turnpike." The court held that except for the closing clause "together with all the rights of the grantor in and to said Babylon turnpike" it was clear that the language of the description excluded the idea that there was any intention to include the highway. The doubt occasioned by this clause made necessary reference to the deeds to the grantor. One of the deeds to the grantor described the property as beginning "on the easterly side of the highway, . . . and at a locust stake driven in the ground," thence running "along said highway," and returning a specified number of feet "to the highway aforesaid at the point of beginning." The other deed to the grantor described the property as being on the northeasterly side of the highway, "beginning at a locust stake and running along the northerly side of the Babylon turnpike . . . 41.7 feet," etc., returning a given number of feet "to the place of beginning." The court in holding that these descriptions showed an intention to exclude the highway, said: "Thus, in each of the deeds to Mrs. Duryea, the grantor of the plaintiff, there is a fixed and definite point marked by a locust stake on the easterly or northerly side of the highway as a monument at which the description commences and to which it returns. The use of this locust stake as a monument, in connection with the other words of the description above quoted, would seem to manifest the intention of the grantors that such stake, and not the center of the highway, should be the monument of the description and thus to exclude the highway from the land conveyed by such deeds."

In *Lee v. Lee* (27 Hun, 1), the property was known and distinguished on a map, a copy of which was annexed to the deed, as lot number three and bounded as follows: "Beginning on the east side of the Bloomingdale road at the southwesterly corner of lot number two," and running thence by courses and distances "to the Bloomingdale road aforesaid thence along the said road five chains to the place of beginning, containing four acres be the same more or less." The map or chart of lot number three annexed to the deed gave the full distance called for by the side lines respectively from the easterly side of the road without extending such lines to the center and so also of lots numbers two and four which were the boundaries on the sides of lot number three. The court said: "The first point of inquiry in such construction is usually to ascertain the place of beginning as the same is designated in the deed, and if the place of beginning, where ascertained, is a monument or in the nature of a monument, that is a controlling circumstance to determine the true location."

When conveyance includes bed of highway.—Continued.

And after quoting from different authorities, the court concluded: "The result of the examination of our authorities is that, under the established rule of construction, by the deed from Hicks to Post, upon which the title of the land in question depends, the east side of the Bloomingdale road is made the monument of the beginning. The fact is strengthened by the fact that the distance by chains and links to Low Benson's land, which is another monument, is fully complemented by the actual measurement, as is also the case by the distance in chains and links of the returning line to the Bloomingdale road; and it follows that the words "thence along said road to the place of beginning" are controlled by the starting monument to mean along the east side of said road. The result is that the title to the lands sold to the assignor of the appellant under the diagram exhibited at the sale was, so far as relates to the land within the boundaries of the old Bloomingdale road, not so free from doubt as that the deed of the referee would give a marketable title."

In *Morison v. New York Elev. R. R. Co.* (74 Hun, 398, 26 N. Y. Supp. 641), presiding justice Van Brunt held that the following description in a deed conveyed no part of the street to the grantee: "Beginning at the northeast corner of lot No. 37, being a point distant 50 feet from the corner formed by the intersection of the southerly side of Duane street with the westerly side of Greenwich street, running thence northerly along Greenwich street, aforesaid 25 feet; thence westerly along lot No. 39, 60 feet; thence southerly along lot No. 32, 25 feet; thence easterly along lot No. 37, 60 feet, to Greenwich street, the place of beginning,—be the said dimensions more or less."

g. Side line of highway as boundary.

Where the side line of a street is given as the boundary line of property the conveyance does not include any part of the highway.

Coster v. Peters, 28 N. Y. Super. Ct. (5 Rob.) 192.

De Peyster v. Mali, 27 Hun, 439 (Reversed in 92 N. Y. 262, but not on this point).

The bounding of a lot by the exterior line of an abutting street as contradistinguished from bounding it by the street, excludes from the conveyance any part of the abutting street, unless there be circumstances indicating a different intention. *Schonleben v. Swain*, 130 App. Div. 521, 115 N. Y. Supp. 23.) In the description of the property discussed in that case, the boundary line run: "Thence easterly parallel with Walnut street 100 feet to the westerly side of Fifth avenue as laid down on said map, thence northerly along the westerly side of Fifth avenue 114.83 feet to the intersection of said westerly side of Fifth avenue with the northerly side of Hawkstone street," etc.

When conveyance includes bed of highway.—Continued.

Where premises are described as running to the side of the road and along the side of the road, the road is excluded by the terms of the conveyance.

Sizer v. Devereux, 16 Barb. 160.

Where in the description in a conveyance, property is specifically bounded by the westerly line of a road, the grantor retains the fee if he owned it.

Mitchell v. Einstein, 105 App. Div. 413, 94 N. Y. Supp. 210.

The description in the deed in *Fearing v. Irwin* (4 Daly, 385), began at a point on the northeasterly corner of Broadway and Ninety-third street, and running thence northwardly along the easterly side of Broadway, etc., to the place of beginning. The court held that the fee of the street was excluded by such description.

A conveyance by metes and bounds which in terms goes "to the side" of a road, thence along "the side of the road," not only conveys no interest in the bed of the road, but, on the contrary excludes the road. (*Van Amringe v. Barnett*, 21 N. Y. Super. Ct. (8 Bosw.) 357; *Anderson v. James*, 27 N. Y. Super. Ct. (4 Rob.) 35.) The property in the *Van Amringe* case was bounded in part as follows: "Along the center line of Fifty-fourth street to the southeasterly side of the Eastern Post road; thence southwesterly along the southeasterly side of the said Post road 143 feet, 10 inches," etc. The court held that the Post road was excluded. In the *Anderson* case the property conveyed was described as running along a certain road, "to Stewart street, and thence along the southerly side of Stewart street westerly," etc. The court in holding that Stewart street was not included in the conveyance said: "It is claimed that the words 'to Stewart street,' carried the grantee to the center of that street, and that these words are not limited in their effect, by the subsequent words 'thence along the southerly side' of such street. This is a question of intention, which is to be determined by the language used. To my mind they plainly indicate an intention to limit the grant to the southerly side of Stewart street. Any other effect which could be given to the words 'to Stewart street,' if they stood alone, is destroyed by the immediately following and restrictive words 'thence along the southerly side' etc."

The property in question in *Clark v. Rochester City & B. R. R. Co.* (50 Hun, 600, 2 N. Y. Supp. 563), was designated as lot number 5 in a certain subdivision and bounded as follows: "On the north five hundred and twenty-nine feet, and six inches, on the south line of Park Avenue as now established; on the east by the west line of Meigs street, one hundred and fifty feet; on the south by lot number 6, five hundred and twenty-six and six-tenths feet; and on the west by the east line of the Bixby tract, one hundred and fifty-nine feet,—containing eighty-seven and one one-hundredths acres,

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be the same more or less; reference being had to a map on file in the office of the clerk of Monroe county, made by Silas Beardsley, in November, 1865." The court in holding that this description did not convey the fee of any part of the road bed of Park avenue, said: "Where lands are bounded by a public street, the legal presumption is that the grantor intended to convey the soil. *Usque ad medium filum*. This presumption prevails in all cases, unless the contrary intention is clearly expressed in the language used, locating and describing the premises which are the subject of the grant." and further: "They by the use of the words of the description, viz., 'bounded as follows: On the north five hundred and twenty-nine feet and six inches, on the south line of Park avenue as now established,'—clearly manifested their intention to exclude the bed of the street from the operation of the grant, and made the north boundary line of the premises conveyed the south exterior line of Park avenue."

The boundary description in the conveyance in *Augustine v. Britt* (15 Hun, 395), was as follows: "Beginning at a point formed by the intersection of the westerly side of the Bloomingdale road with the northerly side of Ninety-sixth street, and running thence westerly along the said northerly side of Ninety-sixth street eighty-six feet and eight inches; thence northerly, and parallel with the Eleventh avenue, one hundred feet and eleven inches to the center line of the block; thence easterly along the center line of the block twenty-five feet; thence northerly and parallel with the Eleventh avenue one hundred feet and eleven inches to the southerly side of Ninety-seventh street; thence easterly along said southerly side of Ninety-seventh street eighty-seven feet eight and one-quarter inches to the westerly side of Bloomingdale road, and thence southerly along said westerly side of the Bloomingdale road two hundred and three feet and six inches to the point of beginning; together with the right, title, and interest of the said parties of the first part in or to such parts of the strips of land laid out on the said map as public streets, called Ninety-sixth and Ninety-seventh streets, as lies in front of or adjoining the said lots hereby granted and conveyed, and extending to the middle of the said street."

In *Putzel v. Van Brunt* (40 N. Y. Super. Ct. (8 J. & S.) 501), the property on one side was described as running to a certain monument on the side of a road and thence along the side of the road to another monument at the side of the road. The court in holding that the road to the center was included, said: "It is a familiar rule that the grantee of a lot bounded on a street *prima facie* takes to the center of the street, and there must be language expressly excluding the street to prevent the grant having this effect. . . . The intention of the several parties is to be ascertained not only from the language in the description of the deed itself, but must ever have reference to relative extrinsic facts. These facts

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may consist of co-temporaneous writings, relating to the same subject; by reference in this case to the deeds and circumstances relating to the premises described in them, which brought the title down to Barclay. As a clue to this intention and the import or effect of conveyances, we are permitted to look to the undisturbed use of the right contested, on the one side, and the unqualified acquiescence, on the other, down to the time of the purchase of the premises by the defendant. . . . It was impracticable and unusual to place the monuments "K" and "19" elsewhere than on the side of the road; while it is apparent that the measurement of land extended to the center. . . . It is well-known that in the rural districts it is the custom in the survey of lands to mark courses and distances by artificial monuments, and in case the boundary is made by the highway these monuments are placed on the side of the road between the exterior line enclosing the street and the road bed, while the quantity of land conveyed extends to the center. Where, therefore, the road is the limit and boundary the expression is both natural and common "to the side and along the side," thereby defining in common parlance that portion of the road lying between the exterior limit and the center."

h. Effect of statement of dimensions of property.

An intention to exclude a street from a conveyance is not manifest by the statement of the dimensions of the lot and such a statement must be regarded as subordinate to and controlled by a previous reference to the street as a boundary line.

Sherman v. McKeon, 38 N. Y. 266.

In *Johnson v. Grenell* (188 N. Y. 407, 81 N. E. 161, 13 L.R.A.[N.S.] 551), the owner of an island sold "lot number 34 as laid out on the map of the Grenell Island Park, the lot laying on the south east shore and adjoining lot 175, on the south west of lot now deed to Widener, the lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less." Upon this map a boulevard extended along the southerly shore of the island between lot 34 and the river. The court in holding that all of the boulevard in front of the lot was transferred said: "So far as the description of the premises included dimensions, they may be disregarded, as affecting, or limiting, the land conveyed. The words "lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less," if not meaningless, are too ambiguous."

i. Effect of stating acreage.

In *Cochran v. Smith* (73 Hun, 597, 26 N. Y. Supp. 103), the facts showed that a common grantor conveyed property by separate conveyances to the plaintiff and the defendant. The whole property conveyed which consisted of two acres of land was bounded on the west by Fairview Avenue,

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on the north by Bayport Highway, on the east by lands of Gillette, and on the south by lands of the grantor. It was the design of the grantor to carve out between those boundaries two parcels which would each contain one acre of land. The corner lot was deeded to the plaintiff. The description in the plaintiff's deed was as follows: "Commencing at the northwest corner thereof, i. e. the land conveyed, at the junction of Fairview avenue with the main road running through Bayport; thence running southerly by Fairview avenue, 20 rods; thence running easterly 8 rods to lands of Oliver C. Smith (the defendant); thence running northerly by land of Oliver C. Smith, 20 rods, to the main road running through Bayport; thence running westerly, by last-mentioned road, 8 rods, to the place of beginning,—containing just one acre of land." The question was whether the conveyance to the plaintiff included to the center of Fairview Avenue. It was shown that if the center of the avenue was taken as the plaintiff's westerly line, he would have just an acre of land west of the land claimed by the defendant. The court at General Term, was of the opinion that the conveyance carried to the center line of Fairview Avenue; but as the Trial Court had directed a verdict for the plaintiff, which was in effect a holding that the highway should not be included, the General Term sent it back for a new trial with the statement that "while it is province of the court to construe written instruments, it is yet the province of the jury to determine boundary lines of land in controversy in legal proceedings, from all the evidence. In our view, the evidence requires a verdict in favor of the defendant, but the question of fact must be left to the jury, under proper instructions, the legal effect of the deed of conveyance, and the evidence adduced by each party." In considering the description in the plaintiff's deed, the court said: "So it is that the place of beginning is the junction of the two roads, and the line runs "by" Fairview avenue, then easterly, then northerly "to the main road," then westerly "by last-mentioned road;" and the employment of the words "by" "upon," or "along" a road manifests an intention to include the road in the grant, to the center line. *Mott v. Mott*, supra. Here the place of beginning being the junction of Fairview avenue and the Bayport road, and the presumption being that the grantor of the plaintiff owned to the center line of the two roads, the place of beginning is the point at the junction of the center line of the two roads. (*Holloway v. Delano*, 64 Hun, 27, 18 N. Y. Supp. 700.) From that point the line runs southerly "by" the avenue; and, so in obedience to the rule we have stated, it runs with the center thereof. Then, returning, when the Bayport road is reached, the line runs "by" that road, and so by the center line of the same. The language is plain, and free from obscurity, and our conclusion from it is in accordance with all the adjudicated cases and the elementary writers."

In *Tag v. Keteltas* (48 N. Y. Super. Ct. (16 J. & S.) 241), the property

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in question contained the acreage called for in the conveyance exclusive of the road. The court in holding that the road was not included said: "If we were limited to the description of this deed alone, we must decide that this conveyance included the road to the center thereof. But in this description there are no monuments which can determine the northerly and southerly lines of said description, and no authorities can be found which under such circumstances holds that the three chains running from the center of the road can be extended so as to be three chains plus one half the road."

j. Where breadth of street is mentioned.

Where a boundary is mentioned as an entirety, the deed conveys to the center of the boundary, and the fact that the boundary is described as having space and not as a line, does not convey any impression that the grantor intended his grant to stop short at the side of the space which is mentioned and described as an entirety. (*Stevens v. City of New York*, 46 N. Y. Super. Ct. (14 J. & S.) 274.) The boundary in the deed in that case was by a street 60 feet in breadth. The court held that the street was nevertheless the boundary and not the side of it.

If the street as an entirety is stated to be the boundary as distinguished from a side of it, the land goes to the center line of the boundary. The boundary is treated as if it were a line. (*Miner v. City of New York*, 37 N. Y. Super. Ct. (5 J. & S.) 171.) In that case the deed bounded the property by a street 60 feet in breadth lying "between" the lot granted and the adjoining lot and it was argued that such words separated and distinguished the lots from the street, and the streets from the lots; but the court held to the contrary, saying: "Necessarily, any street, lane, fence or wall used as a boundary in a deed, must be between the land conveyed and the adjoining land. I cannot see that a statement in words, that the boundary is between the two should have greater force than should the fact itself, of which these words are only descriptive."

k. Reference to map.

It has been assumed for many years to be the settled law that a conveyance describing property as bounding upon a street or highway, laid out upon a map carried with it title to the land to the center of the street. The reason for such rule was found in the fact that ordinarily, in conveyances of such a character, no purpose would be served by reserving to the grantor the title embraced within the street opposite to the premises conveyed, as it would not be available for any purpose of use independent of an easement for passage by the public; and for this, among other reasons, a presumption was indulged that the conveyance carried

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title to the center of the street, even though such part was not contained within the metes and bounds of the conveyance.

White's Bank v. Nichols, 64 N. Y. 65.

In a description which identifies the property sold as lots shown upon a map upon which also appears abutting streets, the conveyance will be presumed to include the abutting streets to the center line thereof whether or not at the time of the conveyance the streets have been actually opened. (*Woolf v. Woolf*, 131 App. Div. 751, 116 N. Y. Supp. 104.) The conveyance in that case after referring to lot numbers with reference to a certain map described the property as follows: "Beginning at the northwesterly corner of Walnut street and Eighth avenue; thence running westerly along the said Walnut street 50 feet; thence northerly, parallel with Eighth avenue, 100 feet; thence westerly, parallel with Walnut street, 50 feet; thence northerly, parallel with Eighth Avenue, 50 feet; thence easterly parallel with Walnut street 100 feet, to said Eighth Avenue; and thence southerly along said avenue, 150 feet, to the corner aforesaid and place of beginning."

Where a conveyance describes property by courses and distances and on inspection of the map referred to in the conveyance, one of these courses is found to run along a street, it is as if the property had been described as running to and along said street, and the conveyance includes to the center of such street.

Sizer v. Devereux, 16 Barb. 160.

In *Perrin v. New York Central R. R. Co.* (36 N. Y. 120), certain lots were conveyed solely by lot numbers and by reference to a certain map. On the map these lots were shown to be on either side of a strip of land designated on the map as "park." The court in holding that the grantees of the individual lots took to the center of the open space called "park" said: "Most of these lots had no other access to the public streets as only one end of this strip of land opened on a public street. There was no indication on the map, on the ground, in its subsequent use, or in the deeds of the adjoining lots afterward executed, of an intention to leave this strip of land open and vacant for ornament. On the contrary, the inference must be directly the reverse, for its form and location rendered it inappropriate for that purpose, while it was needed and became useful and valuable as a means of access to the lots in the rear of those fronting on public streets. It is beyond controversy that this strip of land was to be left open and vacant for the use of the owners and occupants of the adjoining lots, for all the purposes of a street; and there is nothing to indicate that the plaintiff entertained any other or different purpose. Then, to adopt the language of Mr. Justice Mason, in *Bissell's case supra*, 'as between these parties, grantors and grantees, it is a public street to all intents and purposes, except that the public authorities are not bound

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to keep it in repair. It is made such by the plaintiff himself in laying out the street and putting it upon the map, and selling these lots upon either side of it with reference to the map and street; and he has probably received the full value of the street in the increased price of the lots sold upon it." It is urged that the designation of "Park" on the map was of controlling significance against the intention that the dedication was for a street. The Supreme Court adopted this view. The learned judge at the circuit found and decided "that when the plaintiff laid out and platted his tract, which included the premises in question, he intended the space of land in question to be what he has designated it on the map—a park—and not a mere passage way, leading by and to the adjoining lots." This finding is based on the fact that he designated the strip of land "Park" on the map. What it was called I think of very little importance, when its use and principal purpose is obvious beyond possible conjecture. It cannot be denied that it was to be used as a passage way or street. This became a necessity from the location of the lots abutting upon it. This necessity rendered it inappropriate as a park. Nor does it answer the strict definition of *park* as platted on the map. A park is, in its strict sense, a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament. This strip of land was uninclosed—open to the common and was intended so to remain—nor was it set apart either for pleasure ground or for purposes of exercise, amusement or decoration. Its scope and situation was unsuitable for either purpose. It was opened *for use and use alone*, that use was as a passage way or street. This was its primary and chief design, and, so far as the case shows, its only design. Although called a park, as we have seen, it was not a park, and its intended use as a street was as much beyond question as was the use of Erie street in Bissell's case, *supra*."

In Matter of Mayor, etc., of City of New York (73 App. Div. 394, 77 N. Y. Supp. 31), the grantor conveyed by lot number designated on a map, thus referring expressly to the premises conveyed as the lot specified indicating an intention to convey by the map in which the fee of the street would be included. The description then continued "the premises conveyed being bounded as follows on the said map: Beginning at a point on the westerly side of Prospect street distant 50 feet northeasterly from the northerly corner of Prospect street and Waverly place; from thence running northwesterly, and parallel with said Waverly place, 150 feet; thence southwesterly, and parallel with Prospect street aforesaid, 50 feet to Waverly place; thence southeasterly, along and parallel with said Waverly place, 150 feet to Prospect street; thence northeasterly, along and parallel with said Prospect street, 50 feet, to the place of beginning." The court in holding that the grant was to the center of the street said: "A street, when described as the boundary of a piece of property conveyed, is regarded as a line, and that line is the center of the street; and when

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the boundary runs to and along the street it clearly includes the fee of the street.

In *Edsall v. Howell* (86 Hun, 424, 33 N. Y. Supp. 892), the premises in question was described in a deed as lot number 1 on the corner of Howell and Walnut streets as laid down and described in a certain map, said lot being according to said map 132 feet on Howell street by 82½ feet on Walnut street and containing about one-fourth acre of land. The court held that title to the center of the street was conveyed.

In *Tinker v. Metropolitan Elevated R. R. Co.* (81 Hun, 591, 30 N. Y. Supp. 1014), the property was described as being on the northerly side of Murray street, distinguished on a certain map as number 380 and bounded southerly in front by Murray street, etc. The court held that this description carried to the center of the street.

In *Gorham v. Eastchester Electric Co.* (80 Hun, 290, 30 N. Y. Supp. 125), the deed described the land as lot number 400 on a certain map and as bounded easterly by Fifth avenue and southerly by Valentine street. The court held that this description conveyed title to the center of Valentine street.

In the deed to the plaintiff in *McCruden v. Rochester Ry. Co.* (5 Misc. 59, 25 N. Y. Supp. 114, aff'd 77 Hun, 609, 28 N. Y. Supp. 1135), the land was described as certain lots situated in the city of Rochester and the land was designated simply by the numbers of the lots. It appeared from the testimony that the lots of the plaintiff abutted upon Plymouth avenue. The court said that when that appeared the presumption of law was that the plaintiff took title to the center of the street.

If it is the intention of the grantor who conveys lots having streets along them, to exclude the streets, his description must be clear and certain showing such intention. (*Lozier v. New York Central R. R. Co.* 42 Barb. 465.) The first deed construed in that case described the property as certain lot numbers on Green street, according to a supplementary map or survey. Two of the lots were opposite each other and the court held that the conveyance included the whole of Green street lying between them. The others being on the same side of the street the conveyance carried to the center thereof. The next conveyance described the property as certain lot numbers on the north side of Green street and the court held that it was not the intention of the parties to exclude the north half of Green street. In the next conveyance, the lots were designated by their numbers as upon the map and the streets along which they lay were also specified as "on the west side of Front street." The last conveyance bounded certain lots on the east by Lock street fifty-six feet, "on the south on Green street ninety-nine feet and being in a body in the corner of Lock street and Green street containing more or less according to the aforesaid map, refer-

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ence being thereunto had." The court held that it was entirely clear that this description carried the land in fee to the center of the street.

In *Johnson v. Grenell* (188 N. Y. 407, 81 N. E. 161, 13 L.R.A.[N.S.] 551), the purchaser of an island in the St. Lawrence river caused the same to be laid out into lots, with boulevards, streets and roads; according to a map which she made and filed. She sold lot number 34 described as "laid out on the map of the Grenell Island Park, the lot laying on the south east shore and adjoining lot 175, on the southwest of lot now deeded to Widener, the lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less." "South Boulevard" upon the Grenell map extended along the southerly shore of the island and intervened between lot 34 and the river, being 50 feet in width. The court in holding that all of the Boulevard in front of the lot was transferred said: "So far as the description of the premises included dimensions, they may be disregarded, as affecting, or limiting, the land conveyed. The words 'lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less,' of not meaningless, are too ambiguous. What the original deed of Mrs. Grenell intended to grant was to be ascertained from her map. It conveyed a piece of land known as lot number 34 on the map, being on the southeast shore, with a road in front of it extending to the waters of the river.

A patentee who acquires property from the state described as block 74 as designated on a certain map, and the map designates different streets as the boundary of said block, has title to the fee of such streets to the center thereof, and this is true although the street has never been opened or used as streets.

Gere v. McChesney, 84 App. Div. 39, 82 N. Y. Supp. 191.

It is not sufficient, to exclude from the operation of a grant, the soil of the highway up to the center, that the grant is made with a reference to a plan annexed, the measuring or coloring of which would exclude it, or by lines and measurements which would only bring the premises to the exterior line of the highway, or that they are bounded by the line of the highway, or by any similar expression.

Pollock v. Morris, 51 N. Y. Super. Ct. (19 J. & S.) 112.

1. Effect of ownership by grantor.

The premises in question in *Mattlage v. New York Elevated Ry. Co.* (14 Misc. 291, 35 N. Y. Supp. 704), were originally a part of the land under the waters of the Hudson River, and were owned by the City of New York. The City of New York conveyed the same to the upland owner, the corporation of Trinity Church. By the deed of conveyance the grantor covenanted to leave a street of 66 feet in breadth to be known as Greer

When conveyance includes bed of highway.—Continued.

wich or First street, to extend along highwater mark of the land conveyed, the same to remain a public street of said city. The property by means of conveyances was deeded to the plaintiff, and in such deed was described as bounded "easterly in front by Greenwich street." The court in holding that the plaintiff owned the fee of soil of Greenwich street to the center thereof, restated the rule that "if the grantor of land which is described as bounded by a street or highway is at the time of the conveyance also seized in fee of the land over which such street or highway extends, he will be presumed to have included the last mentioned land to the center thereof, and the further rule that courses, distances and dimensions must yield to boundaries unless an intention that the former shall be controlling clearly appears."

The deed construed in *Terrett v. New York & Brooklyn Steam Saw Mill & Lumber Co.* (49 N. Y. 666), bounded the land conveyed on one side "by the southeasterly line or side" of which was formerly known as First avenue in the City of Brooklyn. This avenue had never been opened as a public highway and had been discontinued by act of the Legislature. The conveyance contained this clause also, "together with all the right and title of the grantor in and to one-half of the streets and avenues by which said lots are bounded." There was no other avenue referred to in the description of the granted premises, and the grantor had title thereto. The court held that the deed carried the title to the center of the avenue.

Where the record title under which a party claims shows that the premises were bounded by a certain street, and not by the line of the street, the fee to the center of the street is included, provided the grantor owned the fee.

Appleton v. City of New York, 148 N. Y. Supp. 870.

A deed which bounds property upon a street in the absence of any description by metes and bounds carries title to the center of the street provided the grantor owns to the center.

Matter of Lawrence Street in the City of New York, 136 N. Y. Supp. 845.

m. Specific conveyance of highway.

Wheeler v. Clark (1 T. & C. Add. 8), was a specific conveyance of a highway to the center thereof.

n. When entire highway included.

Haberman v. Baker (128 N. Y. 253, 28 N. E. 317, 13 L.R.A. 611), and *Johnson v. Grenell* (188 N. Y. 407, 81 N. E. 161, 13 L.R.A.(N.S.) 551), are the only two cases where the entire highway was included in the grant.

When conveyance includes bed of highway.—Continued.

Where the highway has been wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole road-bed; upon the same principle that exists for giving the fee to the center in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highway. (*Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370, 13 L.R.A. 611.) The description of the premises conveyed in that case, bounded them "along the Bloomingdale road" and, where they adjoined Stillwell's road, "along said road . . . to the Bloomingdale road." The Stillwell road ran wholly upon the grantor's land and partly upon the northerly margin of the premises in question. The court in holding that the ownership of the soil of Stillwell's road where adjacent to the property granted passed to the grantee as a parcel of the grant, said: "In the early case of *Jackson v. Hathaway*, supra, it was observed that there was reason for intending that the parties to a conveyance of property bounded along or upon a highway meant to the middle of the highway. Would there not be equally reason for the legal intendment that they meant the whole highway, where it was the property of the grantor in its entirety? Can we suppose an intention in the grantor to reserve to himself, or to his heirs, the fee in half of the highway? I think not. As to the grantor, the control and beneficial use of the road have ceased to be of importance, but to the grantee they must be important, if not essential, for many patent reasons. The case of *Bissell v. New York Central Railroad Company*, supra, though applied to a case where the question of title related to only half of the street, is authority for the proposition that there is no reason to infer an intention in the grantor to withhold his property in, or title to, the land covered by the highway, after parting with all his right and title to the adjoining land."

In *Johnson v. Grenell* (188 N. Y. 407, 81 N. E. 161, 13 L.R.A.(N.S.) 551), the purchaser of an island in the St. Lawrence river caused the same to be laid out into lots, with boulevards, streets and roads, according to a map which she made and filed. She sold lot number 34 described as "laid out on the map of the Grenell Island Park, the lot laying on the southeast shore, and adjoining lot 175, on the southwest of lot now deeded to Widener, the lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less." "South Boulevard" upon the Grenell map extended along the southerly shore of the island and intervened between lot 34 and the river, being 50 feet in width. The court in holding that all of the Boulevard in front of the lot was transferred said: "So far as the description of the premises included dimensions, they may be disregarded, as affecting, or limiting, the land conveyed. The words "lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less," if not meaningless, are too ambiguous. What

When conveyance includes bed of highway.—Continued.

the original deed of Mrs. Grinell intended to grant was to be ascertained from her map. It conveyed a piece of land known as lot number 34 on the map, being on the southeast shore, with a road in front of it extending to the waters of the river. Had the grantor intended to reserve the land in the roadway, or any part of it, she could have done so; but there is an absence of any language, from which such an intention could be implied. Indeed, there is no sufficient reason apparent to infer an intention by the grantor, when parting with her title to the only land adjoining the road, to reserve any interest in the fee of the road itself. Manifestly, from the facts, an inducement to the purchaser of the lot was its being shown, and stated, to lie upon the shore of the island and the enjoyment of the riparian advantages conferred a distinct value. The ordinary presumption is that, in the absence of contradictory terms, the grantor does not intend to retain the fee of the soil in the street. That Mrs. Grenell's grantees took by her deed, certainly, one-half of the road was conceded and had she owned any land upon the other side of the road, the other adjoining half of the road would have remained hers. As we have seen, that was not the case and the defendant cannot claim that any riparian rights remained in Mrs. Grenell. In the absence of anything expressing a contrary intention, those rights follow a grant of the uplands."

o. Rule same in city and country.

In this state, as between a grantor and grantee, the conveyance of a lot bounded upon a street carries the land to the center, and there is no distinction, in this respect, between the streets of a city and country highways.

Paige v. Schenectady Ry. Co., 178 N. Y. 102, 70 N. E. 213.

Bissell v. New York Central R. R. Co., 23 N. Y. 61.

Wager v. Troy Union R. R. Co., 25 N. Y. 526.

White's Bank of Buffalo v. Nichols, 64 N. Y. 65.

Potter v. Boyce, 73 App. Div. 383, 77 N. Y. Supp. 24.

Wallace v. Fee, 50 N. Y. 694.

Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047.

And the rule applies, although the conveyance contains no reference to the street by name, but the lot is described by the number according to an allotment and survey made by the original proprietor, upon whose map the lot is represented as abutting upon a street, and the depth of the lot is stated by figures, which would not include any part of the street. (*Hennessey v. Murdock*, 137 N. Y. 317, 33 N. E. 330.) A conveyance in that case, of a part of lot number sixteen on a certain map, was described as beginning at the northeast corner of lot number sixteen on the west line of Washington street, and running from thence westerly, along the north line of the lot, two chains. The north line was a line along a certain lane. A reference to the map showed that the boundaries of lot

When conveyance includes bed of highway.—Continued.

number sixteen carried it to the center of the lane, as far as it effected a conveyance of the fee. The court in its discussion said: "It is not reasonable to infer that the grantor intended to reserve the title to the fee of the narrow strip lying between the physical boundaries of the lot conveyed and the center of the street or that the grantee understood that any such reservation had been made. The use of the fee of the bed of the street is so inseparably connected with the ordinary use of the adjacent lot that a severance of the two will not be deemed to have been effected unless the presumption that the grantor intended to pass title to the center of the street is rebutted by other parts of the deed and by the condition and relation of the parties to the lands conveyed and other lands in the vicinity."

A lot bounded in general terms by a street extends to the middle of the street. (*People v. Law*, 34 Barb. 494, 22 How. Pr. 109.) The court in that case, in holding that the reason for the rule applied alike to city and country property, said: "The reason is substantially the same as applied to a road in the country, or a street in the city; that is, the intervening strip was originally taken, or supposed so to be, for public purposes, from the owners on opposite sides of the street or highway, taken for public purposes, and only so much of it both in regard to the quality and duration of the estate as was supposed to be required for the public use, and is to be returned to the respective proprietors when the public have no farther use for it; or else it was founded upon principles of public policy, based upon the supposed inconvenience or impropriety of having so long and narrow a strip of land or body of water, the subject of a distinct and separate ownership from that of the adjoining territory on either side. In other words, the owners of the adjoining lands have the entire property in the land, subject to the public easement and rights. It may be true, that as regards land in the city, the use of the public is more extended and comprehensive than in the country. It is wanted not only as a road for purposes of passage and transportation, but also for sewers, for vaults, for gas pipes, for water pipes, and other purposes. But the essential characteristic of both is the same, to wit, the public use or necessity. So also the country may ultimately become a town, the town may become a city; and it would lead to embarrassment if different rules of construction were applied to country and to city grants, as well as to difficulty in determining when the actual transmutation from country to city property took place. Whether, therefore, we consider the question as one of naked law upon the construction to be given to a legal instrument, or as a rule of evidence to be applied to those instruments for the purpose of ascertaining the real intentions of the parties, I think the result will be the same."

The common law presumption that proprietors of land adjoining a pub-

When conveyance includes bed of highway.—Continued.

lic highway are the owners of the fee of said highway, applies to the streets of the city of New York as well as to the highways of the country.

Hochalter v. Manhattan Ry. Co., 56 Hun, 642, 9 N. Y. Supp. 341.

Stewart v. Metropolitan Electric Ry. Co., 4 N. Y. Supp. 445, 56 N. Y. Super. Ct. (24 J. & S.) 377.

Wager v. Troy Union R. R. Co., 25 N. Y. 526.

Van Amringe v. Barnett, 21 N. Y. Super. Ct. (8 Bosw.) 357.

The fee of a highway in the City of New York, opened while the city was in the occupation of the Dutch government, having been vested in the Dutch government, and upon the conquest of the New Netherlands by the English, having become vested in the English crown, was transferred by the early charters to the City of New York, but the fee of a road opened under the British rule of the colony of New York remains in the former owners of the property.

Mott v. Eno, 97 App. Div. 580, 90 N. Y. Supp. 608.

The fee of the street laid out in the City of New York pursuant to the Act of 1847 (Ch. 203, Laws of 1847), is vested in the city.

Mott v. Eno, 181 N. Y. 346, 73 N. E. 229.

The city of New York and not the abutting property owners, owns the fee to certain streets conveyed to the mayor, aldermen and commonalty of the city, in 1797 and 1813, by the corporation known as the Rector and Inhabitants of the city of New York, in communion of the Protestant Episcopal Church in the State of New York.

Drake v. The Hudson River R. R. Co., 7 Barb. 508.

p. Conveyance by a municipality.

The rule as to an individual is well settled. His deed of property, bounding it upon a street of a city, conveys to his grantee the fee of the land to the center of the street, subject to the rights of the public for street purposes. This rule may not apply to a city when it is the grantor of lands in such city. The reason for this distinction is that, as in individual grantor, there is no reason for presuming an intention on his part to reserve the fee in the street bounding the lands conveyed, when its control and use had ceased to be of importance, or of benefit to him. But this reason may not apply to a city, where it is vested with the fee to the land in the street, and on each side thereof, and conveys lands, bounding them upon the street. The control of the strip of land in the street has not, as in the case of an individual and of the state, ceased to be of importance or benefit to the city. It has still the burden upon it in behalf of the public, of opening the street, if not yet open keeping it open, working it, repairing it, and caring for it. Apparently the city would have an interest

When conveyance includes bed of highway.—Continued.

in retaining the fee of the street, and would not be presumed to have intended to convey the same to its grantees.

Gere v. McChesney, 84 App. Div. 39, 82 N. Y. Supp. 191.

Where there is a conveyance of property in the city of New York, bounded upon one of its streets, the presumption that the conveyance carries the fee to the center is off-set where the conveyance is by the municipal authority by the presumption that the municipality would not part with the ownership and control of a public street once vested in it to be forever held for the benefit of the public. (*Graham v. Stern*, 168 N. Y. 517, 61 N. E. 891, 85 Am. St. Rep. 694.) The court in its opinion said: "There is an obvious and a material distinction between the case of a conveyance by an individual of lands bounded upon, or by, a street and that of a similar conveyance by municipal authorities. The presumption that obtains, ordinarily, in the one case, I think, should be regarded as offset, in the other, by another presumption that the municipality would not part with the ownership and control of a public street once vested in it for the public benefit. The city was the proprietor of these common lands and they were mapped out for the municipal advantage, in their improvement by future grantees. There was an obvious purpose to subserve, when making grants of lands, in the retention of the ownership of the soil of the streets, which would be absent in the case of a grant by an individual. The municipality was vested with the fee in the soil of the streets and the trust attached that they should be held and kept open as public streets. It is, altogether, the sounder proposition, in my opinion, that the grant of title to property, bounded by, or upon, a city street, derived from the public authorities, in the absence of any more definite description, carries only to the line of the street; inasmuch as, in legal intendment, the street was held as, and should remain, a public highway."

q. Grant by the State.

The rule as to an individual grantor is well settled. His deed of property, bounding it upon a street of a city, conveys to his grantee the fee of the land to the center of the street, subject to the rights of the public for street purposes. This rule applies equally to the state, when it is the grantor of lands in a city, which it had, by map, plotted and laid out into lots, blocks, and streets. As to an individual grantor, there is no reason for presuming an intention on his part to reserve the fee in the street, bounding the lands conveyed, when its control and use had ceased to be of importance, or of benefit to him. The same reason applies to the state, which has no more interest in the streets of a city than an individual. The state does not own such streets, and has no duty with reference to their care, opening, closing, construction, or repair.

Gere v. McChesney, 84 App. Div. 39, 82 N. Y. Supp. 191.

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Cheney v. New York Cent. & H. R. R. Co. (8 App. Div. 620, 40 N. Y. Supp. 1103, 75 N. Y. S. R. 423, *aff'd* 158 N. Y. 739, 53 N. E. 1123), had to do with a grant by the state. The property was in effect described as abutting upon a street without any reservation or declaration of intention not to convey to the center of the street. Judge Vann, in his opinion at Special Term, said: "As between individuals, such a conveyance is presumed to carry the title to the center of the street, subject to the right of way belonging to the general public. The same presumption extends to a grant from the state, and for the same reason, namely, "because a narrow strip, such as half a street, is much more valuable to the grantee than to the grantor, and the parties are supposed to have so dealt with the property as to bring out its greatest value." If the title to public highways was in the state, in its corporate capacity, the presumption might be otherwise, but the state does not own an ordinary highway. State ownership would carry with it the burden of expense for care, construction, and repairs that rests upon subordinate political divisions of the state, such as towns, cities, and villages. When a highway, no matter how ancient, is abandoned, notice need not be given to the state; and it is safe to say that the state has never asserted title to any part of an abandoned highway. If the street in question should be abandoned, the land would not revert to the state, but to the adjoining proprietors. The right of way over land constituting a street belongs to the people at large in their unorganized capacity, but the control of the same is vested by law in certain political agencies, such as those above named, and they are held responsible for the manner in which they discharge their duties. In no sense, however, does the state own the streets of a city, and hence the distinction relied upon by the defendant between public and private grants does not apply to this case. The plaintiffs, in my opinion, own to the center of the street, and are entitled to damages."

The original patent under which the plaintiff claimed in *Paige v. Schenectady Ry. Co.* (77 App. Div. 571, 79 N. Y. Supp. 266), bounded her premises on the west by Washington Avenue. As the grant was from the state the court, followed the case of *Cheney v. Syracuse, O. & N. Y. Ry. Co.*, *supra*, held that the grant carried title to the center of the highway.

A patentee who acquires property from the state described as block 74 as designated on a certain map, and the map designates different streets as the boundary of said block, has title to the fee of such streets to the center thereof, and this is true although the streets have never been opened or used as streets.

Gere v. McCheaney, 84 App. Div. 39, 82 N. Y. Supp. 191.

*When conveyance includes bed of highway.—Continued.**r. Alleys.*

One of the questions presented in *Mott v. Mott* (68 N. Y. 246), was whether, in a conveyance of property adjoining a lane, the lane was to be included within a description bounding thereon, and it was held that, as the lane was a private way of which use could be made by the grantor, the rule was different than that applicable to a public street, and an intent was deduced from the instrument and surrounding circumstances to exclude it from the operation of the grant.

Where the southern boundary of a lot is given as a line running from a certain street westerly 130½ feet on an alley, and adds "together with the right of way of an alley aforesaid, which is forever to be kept open for the use and benefit of the lot to which it is adjacent," the fee of the half of the alley adjacent to the lot conveyed is included in such description.

Hennessey v. Murdock, 137 N. Y. 317, 33 N. E. 330.

In *Rupprecht v. St. Mary's Church Society of Batavia* (131 App. Div. 564, 115 N. Y. Supp. 926), the court held that the presumption of the conveyance of the fee was rebutted by the use of such words as necessarily excluded the highway from the description of the premises conveyed. In that case the description commenced at the northwest bounds of lot 15 on an alley 25 links wide and continued "running thence southwesterly on the easterly bounds of said alley" etc.

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People v. Katz.*(Court of Appeals, October, 1913.)***PEOPLE, Respondent, v. KATZ, Appellant.**

(209 N. Y. 311, 103 N. E. 305. *Aff'g* 154 App. Div. 44, 139 N. Y. Supp. 137.)

1. Indictments and information — Indictment for larceny — Proof of aiding and abetting — Penal Law § 2.

A court in an indictment charging defendant with feloniously stealing, taking, and carrying away the property described, is sufficient to permit proof that the defendant aided and abetted others in the consummation of a conspiracy to commit larceny, as under Penal Law § 2 "a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal."

2. Criminal Law — Similar crimes or acts — Evidence of — Admissibility of to show guilty knowledge.

When guilty knowledge, quite commonly called intent, is an essential ingredient of the crime charged, evidence is admissible of similar crimes or acts committed or attempted at or about the same time by the person charged.

3. Criminal Law — Similar transactions with other men — Evidence of their indictment or conviction — Competency on question of defendant's guilty knowledge.

Evidence that some of the men with whom the defendant had previously been engaged in other business dealings had either been indicted or convicted of other crimes, is competent, for the purpose of proving the defendant's previous connection with other similar transactions through the agency of men whose reputation, no less than the character of the transactions, were important factors in determining whether the defendant was a victim or a conspirator.

4. Criminal Law — When party is accomplice — Question for jury.

Where, on the trial of one of several who have been implicated in a criminal transaction, there is no direct evidence that a certain witness knew anything about the criminal plot which underlay the transaction, it is for the jury to decide, under proper instructions on the

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law, whether the witness was a guilty accomplice or an innocent participant.

5. Criminal Law — When party is accomplice — Question for jury.

Where, on the trial of one of several who have been implicated in a criminal transaction, it cannot be said beyond peradventure that a certain witness must have known of the criminal purpose of some of the accomplices, it is not error for the court to refuse to charge as matter of law that the witness was an accomplice.

6. Criminal Law — Instructions — Testimony of accomplice — Weight to be given.

A charge of a trial court, in referring to the rule which requires corroboration of the testimony of an accomplice, that when such testimony is corroborated by witnesses who appear to be honest and truthful it "becomes testimony of such an order as entitles you to give it great consideration, notwithstanding the fact that it is the testimony of an accomplice," is a fair and conservative statement of the law.

7. Instructions — Request — Precise language of.

Where the charge is full and fair, a refusal to charge in the precise language of a request is not error.

8. Practice and procedure — Instructions — Requests — General exception.

The practice of permitting a general exception to the refusal to charge a mass of requests should not be followed by trial courts or sanctioned by appellate courts.

9. Witnesses — Corroboration by prior statement — Confession by accomplice as corroboration.

When a witness rests under the imputation of a recently formed motive to falsify, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of self-interest would have induced him to make a different statement from that which he actually made, therefore a confession by an accomplice given before he has received a promise of personal exemption if he will become a state's witness may be received as corroborating the testimony given by him on the witness stand.

10. Criminal Law — Statement of witness as to previous testimony before Grand Jury.

Evidence of a witness that he had previously testified before the grand jury on the same matter as at the trial, is not prejudicial, where he is not allowed to testify that his testimony before the grand jury was the same as that at the trial.

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People v. Katz.

Appeal from a judgment of the Appellate Division, First Department.

Prosecution of Charles Katz for grand larceny in the first degree.

Benjamin N. Cardozo and *John F. McIntyre*, both of New York City, for defendant-appellant.

Charles S. Whitman, District Attorney, of New York City (*Robert C. Taylor*, of New York City, of counsel), for the People-respondent.

WERNER, J. The defendant appeals from a judgment of the Appellate Division in the First Department affirming a judgment entered upon a verdict at Trial Term, convicting him of the crime of grand larceny in the first degree. The case is one of unusual interest, both in respect of the novel scheme or method by means of which the crime is said to have been perpetrated, and the number, variety, and importance of the questions which we are asked to decide. More than 300 exceptions were taken by defendant's counsel to the rulings of the trial court, but many of these may be assigned to groups relating to different classes of testimony to which separate objections were repeated as the respective witnesses were examined. These groups of exceptions will, of course, be considered collectively; but even this resort to economy of space and time can only measurably foreshorten this discussion, because a careful and comprehensive statement of the facts is no less essential than a thorough discussion of the questions of law involved.

It appears that one Heinze, a large operator in mines and mining stocks, had been a borrower of money upon the pledge of such stocks. This fact became known to one Clark, a curb broker, who sought an interview with Heinze in July 1909, and learned that the latter was desirous of obtaining a loan of \$50,000 upon a pledge of \$100,000 of mining stocks as collateral. When Heinze asked who was to make the loan, Clark replied that it would be made by the Windsor Trust Company. This

being apparently satisfactory to Heinze, Clark interjected the suggestion that the Windsor Trust Company would not deal with Heinze. Thereupon Heinze sent for Joyce, a broker, and made a formal transfer of the stocks to him for the purpose of enabling him to negotiate the loan. Joyce and Clark at once went to the Windsor Trust Company, where they met one Birmingham, the manager of the bond department. After Joyce and Birmingham had been introduced to each other, and it had been settled that the loan would be made, Joyce executed a note, payable to his own order, upon a form furnished by the trust company, and deposited 15,600 shares of Ohio Copper stock and 4,600 shares of Davis-Daly stock as collateral. Within a few minutes after Birmingham, the employé of the trust company, had taken the note and the stocks into an adjoining room, he returned with \$48,500 in currency which he gave to Joyce, who supposed that the deduction of \$1,500 was to cover the first six months of interest on the note. After Joyce had received his money, and had made a temporary deposit of it in the trust company, he returned to his office, where he was soon joined by Clark, who requested the payment of his brokerage commissions which had been agreed upon at 4 per cent., amounting to \$2,000. Clark received his commissions and Joyce regarded the matter as closed. Within a few days he was surprised to learn that some of the very stocks which he had deposited with the trust company had been sold in the market. At once he went to Birmingham, of the trust company, to inquire into the matter, and ascertained that the loan, which he supposed had been made by the trust company, had in fact been made by some one else, and that the securities which he had deposited as collateral, instead of being safely held by the trust company, had been delivered to one Sherwood. Thereupon Joyce brought the matter to the attention of the district attorney. This is a brief outline of the borrower's connection with this remarkable transaction. We now pass to a statement of the part played by the thieves and those whom they employed.

In the early part of 1909, Clark, the curb broker, had an office in Exchange Place. He had been introduced to the de-

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fendant and one Persch by a man named Schwed. This acquaintance between Clark, Persch, and the defendant ripened into an intimacy which resulted in a business arrangement under which the defendant and Persch were to rent one of the office rooms of Clark, and the three were to share equally in the profits of their joint transactions. This was the situation when, according to the testimony of Clark, there was a discussion between him and the defendant and Persch of a plan for negotiating a loan on the Heinze stocks. Clark called attention to the necessity of procuring an apparently trustworthy party to make the loan, as Heinze had been made quite cautious by a previous experience in which he had lost his stocks. Clark also suggested that he had a relative in a New Jersey bank, representing Keene & Van Cortland who were well-known stockbrokers, and that he might get this bank to clear the loan. The attempt was made, but failed because Keene & Van Cortland refused to sign a trust certificate. At this juncture the defendant is said to have suggested that he knew a broker named Kaufmann who might be able to procure a bank to clear the loan. Kaufmann appeared at the offices occupied by Clark, Persch, and the defendant. The latter, who was just going out, said to Kaufmann, "The boys," referring to Clark and Persch, "have a proposition for you." Kaufmann talked with Clark and Persch and was told that the Eastern Brewing Company, of which the defendant was president, wanted to make a loan of \$50,000 on certain mining stocks, but was not to be known in the transaction, and that Ullman, one of the brewing company's employés, would be the ostensible lender. Kaufmann went out to see about procuring a bank and called at the office of the Windsor Trust Company, where he repeated to Birmingham the substance of the representations made to him by Clark and Persch, and proposed that the trust company clear the transaction for a fee or commission of \$1,000. Birmingham said he would consult the officers of the company and would see Kaufmann later. Meanwhile Kaufmann returned to the offices of Clark, Persch, and the defendant and reported that he had applied to the Windsor Trust Company, and at the suggestion of

Birmingham had put his application in the form of a letter, of which he produced a rough draft, in which the Eastern Brewing Company was named as the lender. The defendant, who had returned to the office, objected vigorously to the use of the name of the brewing company and insisted that Ullman's name be used. Kaufmann returned to the trust company, where Birmingham informed him that the trust company would clear the transaction, and Kaufmann then wrote a formal letter, addressed to Birmingham as manager of the bond department of the trust company, in which he stated that as broker for the lender he had arranged a loan to responsible parties upon a promissory note secured by certain mining stocks; that the borrower was represented by a broker who was on friendly terms with the lender; and, as neither party wished to appear in the transaction, it had been arranged to have the trust company clear the loan; that the lender would deposit with the trust company the principal of the loan and the commissions; and that nothing would be required of the trust company except to transfer the note and securities to the lender in exchange for the cash which was to be deposited. The latter further stated that the trust company was to be held harmless by a separate agreement which was to be executed, and that the commissions for its services should be \$1,500, out of which it was to pay Kaufmann \$500; and it concluded with the statement that the lender was Mr. Henry Ullman, general manager of the Eastern Brewing Company, and that the borrower, so the writer was assured, was not a member of the Heinze family. This letter was shown by Kaufmann to the defendant, and these two then discussed the matter of Kaufmann's commission. It was finally agreed that Kaufmann was to receive \$500 in addition to what he might be able to get from the trust company. Kaufmann and Clark then went to the trust company, where the latter inquired if Birmingham would give him a written confirmation that the trust company would clear the loan, and Birmingham replied that it was not necessary; but in answer to Clark's further inquiry he stated that he would confirm it over the telephone. It was at this point of time in the transaction that Clark re-

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ported to Heinze that the trust company had agreed to make the loan.

There is still another chapter of this story which it is necessary to recite in order to understand the nature and scope of the scheme by means of which possession of the Heinze securities was obtained. One Sherwood was an employé of L. J. Field & Co., a firm of brokers in Broadway. Sherwood had known Clark, Persch, and the defendant for several months. In the latter part of July, 1909, he talked with Clark and Persch about getting a loan of \$50,000 on some Heinze mining stocks. Sherwood said he could furnish the money and was told by Clark that Keene & Van Cortlandt would clear the loan. He took the money to Keene & Van Cortlandt's, but the stock was not there, and the reason assigned was that the party who brought it had asked for a trust certificate which Keene & Van Cortlandt had refused to give. Clark and Persch, to whom Sherwood reported, thereupon asked if the money could not be held pending an effort to get another bank to clear the loan. Sherwood conferred with Mr. Field, who was furnishing the money, and then notified Clark and Persch that the money would be held. It was at this juncture that Kaufmann was called into the transaction, and after he had successfully negotiated for the clearance of the loan by the Windsor Trust Company he and Clark and Sherwood appeared at the banking house of the trust company and there they met Birmingham. Sherwood was introduced as the broker for the lender, and Clark was posing as the broker for the borrower. Owing to some misunderstanding as to the kind of stocks which were to be deposited as collateral, the matter was postponed from Saturday until the following Monday, when there was another meeting at the trust company. Joyce was there with his stocks, and he was placed in one room. Sherwood was there with the money, and he was placed in another room. So far as appears, neither knew that the other was there, and it is certain they did not meet. After the details of the transaction had been satisfactorily adjusted, Joyce took his money, less the \$1,500 retained by the trust company; and the notes and stocks were delivered to Sherwood who took

them away with him. Joyce, as has been observed, did not know that the trust company was retaining \$1,500 for commissions, of which \$500 was to go to Kaufmann, and he supposed that the \$1,500 was deducted to pay the first six months interest on this note; neither did he know that there was any other lender in the transaction than the trust company. Within a few days, Joyce heard of sales of his stocks on the market, and he at once reported the matter to Birmingham, who took fright and called the defendant on the telephone, stating to him that the borrower had made a tender and demand for his stock. This was on Saturday. The defendant replied that the stock was all right and would be produced on Monday. Birmingham was still uneasy, however, and he sent for the defendant, who went straightway to the trust company. There Birmingham said, in substance, that he did not even know if the defendant was in fact the Charles Katz who was president of the Eastern Brewing Company; and the defendant took Birmingham to the bank with which the brewing company did its banking business, and where the defendant was satisfactorily identified.

Before passing to the sale of the stocks, which figure in this transaction, and the disposition of the proceeds thereof, there is one other phase of the scheme which must be noticed. Sherwood came into the possession of both the note and the stocks. According to Joyce's understanding of the transaction Sherwood had no right to either, for the Windsor Trust Company was supposed to be the lender. If a felonious appropriation of the stocks was contemplated, it was obviously important that the thieves should cover their tracks with something bearing at least the semblance of a lawful transaction. This was sought to be accomplished by having Ullman, the innocent dupe who had already been used as the ostensible lender, make a note in which he appeared as the borrower from Persch. This note, which Ullman signed upon the defendant's assurance that it would be all right, contained a clause giving the holder the right to sell the pledged securities at any time or in any manner. Persch then gave Sherwood a written authorization to receive the stocks, and another writing directing Sherwood to

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sell the stocks for Persch's account. This Ullman note was not produced at the trial, and it does not appear what became of it.

We now come to the closing features of this bold and ingenious scheme. Without going into all the details of the disposition of the stocks, it is enough to say that they were sold for \$94,000. Out of this sum Sherwood returned to L. J. Field & Co. the \$50,000 which they had advanced. He further gave them a check payable to the order of Persch and indorsed by him for \$10,175, and drew another check to the order of Persch for \$4,000, which was indorsed over to Sherwood; these two sums representing, as he stated, the 35 per cent. commission which Field & Co. were to have in the transaction. For the balance of \$30,455.78 he gave his check to Persch, which the latter deposited with the Carnegie Trust Company, where he was introduced by the defendant. Sherwood had also turned over to Persch 400 shares Ohio Copper which the latter sold through a broker named Reilly, upon which there was realized \$1,466.25, and this was paid to Persch by Reilly's check. Of this latter sum there was paid to Clark \$488.75 and to the defendant a like amount by the checks of Persch. In addition to this, Clark received Persch's check for \$10,009.92, and Persch's wife received several checks for similar amounts. What became of the other \$10,000? Clark testified that it was paid to the defendant, and the defendant denies it. Clark's story is to the effect that at the Marquette Club Persch tendered to the defendant a check for \$10,000 which the latter declined on the ground that he wanted his in cash; that Persch then said he would give him cash in the morning. And in this connection it should be noted that Clark, Persch, and the defendant were at the bank the next morning. The defendant's version of this part of the affair is quite different. He admits the meeting at the Marquette Club, and admits taking the check; but he says he took it protesting that he could not understand how so large a profit could legitimately have been made in the transaction, and he says he kept it until the next morning, when he returned it because Persch was not able to give a satisfactory

explanation of how he had acquired this amount of money. In respect of the check for \$488.75, which the defendant admits receiving from Persch, the defendant's explanation is that he supposed this was his one-third of the legitimate commissions for negotiating the loan. As bearing upon that circumstance there was other testimony, given by the defendant, which may have been influential in determining the weight which the jury gave to this explanation. The defendant testified that Clark brought to him \$1,000 which was stated to be a part of the commission for putting through the loan; that he deposited the amount and against it he drew a check for \$500 to Kaufmann for his commissions, and another check of \$300 to Ullman for having permitted the use of his name, and the balance of \$200 was split up into three parts between him and Clark and Persch. There are many other facts and circumstances upon which counsel for the prosecution rely to connect the defendant with felonious participation in the larceny charged in the indictment. We cannot further enlarge upon them without extending the discussion beyond reasonable limits. It remains simply to add that the defendant was a witness in his own behalf and testified at length. While he admitted his association with the other persons engaged in this nefarious transaction, he either denied or attempted to explain everything which tended to charge him with guilty knowledge of its true nature. His attitude was that he had innocently become the tool of designing criminals, and to support his asseverations in this behalf he gave evidence of his previous good character and high business connections. The record as a whole clearly presents an issue of fact for the determination of a jury, and we should not disturb the verdict rendered against the defendant unless it appears, as he asserts, that his rights have been jeopardized by erroneous rulings made at the trial.

The learned counsel for the defendant argues that the indictment, which charges the defendant as principal, is not sustained by proof that he aided and abetted others who were not jointly indicted with him. The indictment contains three counts, but the only one we need consider is the first, which

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charges larceny in the simple common-law form. This count charges the defendant with feloniously stealing, taking, and carrying away the property described, and the argument is that such a charge is not sufficient to permit proof that the defendant aided and abetted others in the consummation of a conspiracy to commit larceny. Over against this argument we quote the plain language of the statute that "a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal." Penal Law, § 2; Cons. Laws, c. 40. "Larceny," as defined in section 1290 of the Penal Law, embraces every act which was larceny at common law, besides other offenses which were formerly indictable as false pretenses or embezzlement. And the common-law offense has been held to be established by proof showing that the defendant obtained possession of the property by some trick, fraudulent device, or artifice with felonious intent. *People v. Miller*, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546. The crime charged against the defendant is larceny; and that is the offense of which he was convicted. Under the statute (Penal Law, § 2) he is a principal if he has feloniously taken any part in the commission of the crime, and it was therefore proper to indict him separately, or jointly with others. Either form of indictment will sustain a conviction based upon evidence establishing his guilty participation in the crime, even though he may not have been present at its final consummation. *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; *People v. Patrick*, 183 N. Y. 52, 75 N. E. 963.

It is contended that the trial court erred in receiving evidence tending to prove that the defendant had previously been concerned in an attempt to commit another and similar crime, and this contention is based upon the testimony of one Schwed which was received under objection and exception. Schwed, it will be remembered, is the man who introduced Clark to the defendant and Persch in the early part of 1909, on the same day

that the defendant introduced Persch to Schwed. According to the testimony of Schwed, he had a talk with the defendant at that time in which the latter referred to Persch as the credit man of some bank, who was desirous of making a loan on curb stocks, and that he understood Heinze was always in the market as a borrower in furtherance of his manipulations; that according to reports there was an opportunity to get \$27,000 of the Heinze stocks, consisting of United Copper, Ohio Copper, and Davis-Daly on which the Heinze people wanted to borrow \$15,000 which Persch and the defendant were willing to furnish upon these stock as collateral. Schwed testified that the defendant asked him if he could get a stock exchange house to clear the loan, to which Schwed replied that it ought to be very simple; that thereupon the defendant or Persch said that whoever cleared the loan would have to sign a receipt for the certificates and yet leave them accessible to Persch and the defendant; that Schwed said this was impossible with a stock exchange house. Schwed further stated that the defendant confided to him that the plan was to get possession of the collateral and sell it on the market; that a loan of \$15,000 on \$27,000 of securities would leave a margin of about \$12,000 which would be clear profit; that, when he (Schwed) asked how these stocks would be restored and made good when the loan was called, the defendant explained that the sale of these stocks, and other similar sales, would so depress the stocks that they could be bought back for much less than they were sold, and the difference would represent the profit which would be made in the transaction. Schwed further testified that when he suggested, "Suppose the stocks go up?" the defendant said, "If it goes up, of course there are other cities in which you can do business as well as in New York;" and that the interview was closed by Schwed's statement that the defendant "had better get a crook to do that." The defendant said he could get other brokers, but their standing would not be acceptable to Heinze, and asked Schwed if there was not some way in which they could get in touch with the person who would put through such a deal. It was at this time, so says Schwed, that he took the defendant and Persch over to the

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office of Clark to introduce them. Defendant's counsel challenge the competency of this evidence under the well-known rule that guilt of one crime may not be established by proving the commission of another and wholly independent crime.

The general rule upon which counsel rely is too familiar and too long settled to require discussion. It is the law that ordinarily a man cannot be convicted of one crime by proof that he was guilty of another. *Coleman v. People*, 55 N. Y. 81; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L.R.A. 193; *People v. Governale*, 193 N. Y. 581, 86 N. E. 554. There are various recognized exceptions to this rule, however, and one of them is that when guilty knowledge, quite commonly called intent, is an essential ingredient of the crime charged, evidence is admissible of similar crimes or acts committed or attempted at or about the same time by the person charged. The reasons for the rule and the exception are equally simple and obvious. The general rule is rooted in the principle that a man may not be convicted of one crime simply because he may be shown guilty of another when there is no connection between the two. Simple proof showing that A. shot B. at one time and place throws no light upon the charge that A. poisoned C. at another time and place. In either of these cases guilty knowledge or intent is inferable from the nature and surroundings of each act, and each must be judged on its own circumstances. Quite another principle is to be invoked, however, when guilt cannot be predicated upon the mere commission of the act charged as a crime. In such a case the general rule gives way to the exception under which guilty knowledge of a defendant may be proved by evidence of his complicity in similar offenses under such circumstances as to support the inference that the act charged was not innocently or inadvertently committed. Familiar illustrations of this exception to the general rule are to be found in cases of uttering counterfeit money, in forgery, in obtaining money under false pretenses, and in receiving stolen property. *Commonwealth v. Jackson*, 132 Mass. 16; *Commonwealth v. Bigelow*, 8 Metc. (Mass.) 235; *Commonwealth v. Stone*, 4 Metc. (Mass.)

43; Helm's Case, 1 City H. Rec. 46; Smith's Case, 1 City H. Rec. 49; Commonwealth v. Johnson, 133 Pa. 293, 19 Atl. 402; Coleman v. People, 58 N. Y. 555; Copperman v. People, 56 N. Y. 591; People v. McClure, 148 N. Y. 95, 42 N. E. 523; Commonwealth v. Russell, 156 Mass. 196, 30 N. E. 763; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; People v. Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. Rep. 521, 9 Ann. Cas. 453; People v. Neff, 191 N. Y. 210, 83 N. E. 970; People v. Marrin, 205 N. Y. 275, 98 N. E. 474, 43 L.R.A.(N.S.) 754.

The application to the case at bar of the principle upon which these cases were decided can be simply illustrated in the light of a few undisputed facts. If the evidence had tended to show that the defendant had been guilty of a simple common-law larceny, by a physical trespass and a felonious asportation of the property, it would be true that evidence of other similar larcenies would have been inadmissible. The reason is obvious. In such a case the guilty knowledge or intent is proved by the act itself, and it would add nothing to the proof of guilt to show that on other occasions the defendant had committed other similar larcenies. That is not the case at bar. Here the larceny was committed by means of a conspiracy which required a number of actors to carry out the involved and ingenious plot, and it is quite possible that an innocent man, who had inadvertently and unfortunately made a business connection with one or more of the conspirators, might have been drawn into the meshes of the scheme without any criminal knowledge or purpose on his part. That is precisely the position which the defendant claims to have occupied in this transaction. Although confessedly a participant in certain phases of the scheme, he asked the jury to believe that his connection with it was free from criminality, and his story was such that if the jury had found for him the verdict could not have been questioned for lack of evidence to support it. His narration of the affair, while strongly indicative of guilt, was not incompatible with innocence, and therefore the real issue was whether he was a guiltless scapegoat or a guilty conspirator. That is exactly the typical case in which evidence

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of other similar offenses may be proven. The talk with Schwed about the \$15,000 loan was practically identical, in point of time, with the transaction in the case at bar, and it related to a loan upon the Heinze mining stocks. The scheme suggested was in all its essentials the same as this, and the conversation about it led to a meeting of some of the very persons who now figure among the conspirators before the court. The fact that the first scheme was not carried to a successful conclusion does not affect the admissibility of the evidence. It was just as competent and cogent for the purpose of proving the defendant's state of mind as it would have been if the thing had actually been accomplished. We conclude therefore that the evidence of Schwed was competent. It should have been withheld, it is true, until some evidence had been given of the commission of the crime charged in the indictment; but the order of procedure was wholly within the discretion of the trial court, and we cannot see that the defendant was in any wise prejudiced by this departure from routine practice. In this connection it is pertinent to observe that, we think, there is no merit in the exception to that part of the trial judge's charge which referred to the conversation testified to by Schwed. When the charge is read in its entirety, it will readily be seen that the jury were left in no doubt as to the purpose for which the testimony of Schwed was received. It was received solely on the question of intent. It is also asserted that error was committed in permitting Schwed to testify that he had communicated to the defendant the opinion of a member of the Stock Exchange that the proposed transaction was criminal. Upon this point it is sufficient to say that it was just as proper for Schwed to state to the defendant the opinion expressed by a third party regarding the character of a transaction, as it was to express his own opinion. Both bore directly upon the subject of defendant's guilty knowledge and we think both were competent.

Under this head we may also dispose of another line of exceptions to evidence germane to the subject of the defendant's guilty knowledge, although his counsel very skillfully attempt to give this evidence an entirely different classification and ef-

fect. It is said that the court erred in allowing the district attorney to prove that some of the men with whom the defendant had previously been engaged in other business dealings had either been indicted or convicted of other crimes. The defendant was being cross-examined. Upon the direct examination he had denied, or sought to explain away, everything that tended to implicate him in the criminal features of the transaction in the case at bar. The district attorney was trying to show that in May, 1909, the defendant had been associated with Adams (alias Fiske) and Aldhouse, both of Boston, in a similar transaction. With reference to this Boston transaction, as in the transaction at bar, the defendant was compelled to admit his participation, but denied knowledge of its criminal aspects. By dint of persistent questioning the district attorney finally succeeded in bringing to light certain circumstances which, in connection with the defendant's qualified admissions, proved that the Boston transaction was essentially similar to this transaction. It appeared that the defendant and Persch went to the office of Moran or Seymour, where there was a scheme on foot to loan money on Heinze stocks on notes for a year, and that the effort was to cause the stocks to depreciate to such an extent that Heinze would be unable to put up sufficient additional collateral to save them from sale. The defendant was with Persch when he delivered to Seymour some of these stocks, and for them Persch received Sherwood's check. The defendant would not deny that in that transaction, as in the case at bar, Ullman was the ostensible leader, and he admitted point blank that in that transaction he received a commission of \$5,000 for doing no more, as he stated, than accompanying Persch to Seymour's office. We think it was clearly competent for the district attorney to show that the defendant, who was posing as an innocent man, had been engaged in another transaction so similar to the one at bar that it needs only the transposition of a few names and figures to make them identical. Since the defendant was stoutly protesting his innocence and throwing his previous good character into the balance, it was also proper to show that the defendant was associating with men like Persch and Adams

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and Aldhouse, about whose antecedents he had made no inquiry, and who were engaged in transactions which resulted in criminal prosecutions. It should be remembered that this is not a case in which the defendant or any of his witnesses were assailed by evidence of other convictions or prosecutions. The evidence was elicited solely for the purpose of proving the defendant's previous connection with other similar transactions through the agency of men whose reputations, no less than the character of the transactions, were important factors in determining whether the defendant was a victim or a conspirator. All this bore directly upon the question of defendant's guilty knowledge, and the evidence was therefore competent.

Counsel for the defendant complain of the refusal of the trial court to charge as matter of law that Kaufmann and Birmingham were accomplices. We think the refusal to so charge was right. The court did charge as a matter of law that Sherwood and Clark were accomplices, and their connection with the affair was so palpably criminal that no other charge would have been correct. It was different as to Kaufmann and Birmingham. Kaufmann had been called in as a broker under circumstances which were quite consistent with his representations to Birmingham to the effect that the Eastern Brewing Company, or Ullman, its employé, was to be the lender, and there is no direct evidence that he knew anything about the criminal plot which underlay the transaction. Birmingham knew, of course, that the Windsor Trust Company was not making the loan, but he denied that he had ever made any such representations to any one, and it cannot be said beyond peradventure that he must have known of the criminal purpose of Clark and Persch and Sherwood. In these circumstances the learned trial court rightly concluded to leave it to the jury, under proper instructions, on the law, to decide whether Kaufmann and Birmingham were guilty accomplices or innocent participants; and we think no reasonable criticism can be made upon the charge in this respect.

We may here also notice another exception to the charge which is germane to this subject. The trial justice, in referring

to the rule which requires corroboration of the testimony of an accomplice, said that when such testimony is corroborated by witnesses who appear to be honest and truthful it "becomes testimony of such an order as entitles you to give it great consideration, notwithstanding the fact that it is the testimony of an accomplice." Had the court instructed the jury that great consideration must be given to such testimony, it would doubtless have been error, for it is the sole province of the jury to determine how much weight shall be given to it. Although at first glance the language of the charge seems to suggest the idea that the court had told the jury how much credit must be given to the testimony of the accomplice, a closer view justifies a different conclusion. The learned justice said, in effect "when the testimony of an accomplice is corroborated by witnesses who impress you as being honest and truthful witnesses, it may be of so convincing a character as to entitle it to great consideration." When this part of the charge is considered in connection with the context, it must be regarded as a fair and conservative statement of the law.

So, too, we are unable to agree with the defendant's counsel in their contention that the trial justice erred in refusing to charge the seventy-second request relating generally to the subject of corroboration of accomplices. As to this it is enough to say that the charge was full and fair, and the refusal to charge in the precise language of the request was not error.

The learned counsel for the defendant further insists that the court erred in refusing to charge the forty-fifth, forty-sixth, forty-seventh, and fifty-seventh requests. These were included in the 102 requests which had been handed to the court, but not read to the jury, and they were all to the effect that mere passive knowledge on the part of the defendant that a felony was to be committed would not be sufficient to ascribe to him such an affirmative and active intent as to render him a guilty party. We have only to call attention to certain parts of the charge to meet this criticism. The learned trial justice charged specifically that the defendant could not be convicted unless found guilty of a criminal intent, and that his guilt must be deter-

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mind on facts which show the part he had in the transaction, and not on the guilt of any other person. The jury were plainly told that they must acquit the defendant unless the evidence was convincing beyond a reasonable doubt that he actually knew the others were contemplating a larceny, and that he aided and abetted them. The court left no doubt in the minds of the jury that if they find that "defendant had an honest belief that he was entitled to do what he did, and there was no intent to steal, there was no larceny." This, and much more, renders it certain that the defendant's rights were not prejudiced by the failure to charge in the precise language of the four requests to which we have referred.

We have already called attention to the fact that counsel for the defendant presented 102 requests to charge. According to the common practice in the city of New York these had been reduced to writing and submitted to the court in advance of the charge. At the conclusion of the charge the justice said, "The defendant may have an exception to all other requests," and counsel for the defendant then inquired, "May they all go on record, and we have an exception to each one?" To this the court responded: "Certainly. The counsel have submitted to the court 102 requests to charge, and the court grants an exception to each and every request refused by the court on the ground that they are already covered in the charge." Defendant's counsel then added, "And the defendant takes an exception to the refusal of the court to charge each and every request propounded by the court," to which the court answered, "Yes." In our discussion of those requests to charge which the defendant's counsel considered of sufficient importance to mention in their brief and upon the oral argument, we have treated them as though proper exception had been separately taken to each refusal to charge. In view of this disposition of the matter, the practice agreed upon by court and counsel in respect of the requests to charge is merely a matter of academic interest in the case at bar. It is a practice, however, which we think should not be followed by trial courts or sanctioned by our appellate tribunals. Nothing could more clearly illustrate the vice of permitting a

general exception to the refusal to charge a mass of requests than the result in the case at bar. Out of the 102 requests, counsel for the defendant have selected a number for specific attack. They might have chosen any number of others, and among them some which could easily have been modified or adapted to the case in hand if not literally correct. The purpose of making requests should be to enable the trial court to correct at once any mistakes that may have been made in instructing the jury; but the practice pursued in the case at bar renders it possible for astute counsel to raise exceptions purely for the purpose of an appeal. It is never safe to assume that a particular request has or has not been charged until court and counsel are in accord as to what a given request actually imports. It frequently happens that a request, apparently correct on its face, may easily be so modified or changed as to render it free from reasonable criticism; but that is impossible if counsel may be permitted to defer selection and argument until the case is heard on appeal. It argues nothing to say that the exceptions were taken in this general form with the acquiescence of the trial court. That consideration may relieve counsel from personal criticism, but it does nothing to obviate an evil that would soon become intolerable if permitted to prevail.

Having discussed the various phases of this appeal, upon which our views are clearly at variance with the contentions of counsel for the defendant, we now pass to the consideration of a question which is at once interesting and debatable. The question is whether it is ever permissible to corroborate the testimony of a witness by proof of his prior consistent statements, and, if so, under what precise conditions. Before going into the history of the subject, as disclosed by the decisions and text-writers, it will be well to see just how the question arises. The witness Clark, as has been stated, was an accomplice in the perpetration of the crime charged against the defendant. The trial court held as matter of law that he was an accomplice, and the record fully justifies the ruling. At the opening of the trial the district attorney admitted that he had promised immunity

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to Clark if he would become a witness against the defendant. The cross-examination of Clark by defendant's counsel was one long and persistent effort to break the force of his testimony, which bore heavily against the defendant, by showing that he was surrounded by every temptation to falsify in order to earn his recently promised immunity. After the cross-examination the district attorney offered in evidence a typewritten statement which Clark had dictated to a stenographer in the office of his attorney shortly after his arrest and about a year before he had any communication with the district attorney on the subject of immunity. This typewritten statement was in all essential particulars the same as his testimony on the trial. The proposed evidence was objected to by defendant's counsel, but the court received it and gave the defendant an exception. This is the manner in which the question arises. The district attorney defends the ruling upon the theory that an accomplice, and especially an accomplice who has been promised immunity, is always under a suspicion of discredit, implied from his interest to screen himself and to secure the conviction of his associates, and that it is therefore competent to corroborate him by showing that at some time anterior to the period when the temptation to falsify may be deemed to have arisen he made a statement which is consistent with his sworn testimony.

This was the view taken by the learned Appellate Division, as expressed in the opinion of Mr. Justice Scott upon the authority of *Matter of Hesdra*, 119 N. Y. 615, 23 N. E. 555, and *Robb v. Hackley*, 23 Wend. 50. *Matter of Hesdra* was a contest over a will alleged to have been fabricated by one O., a witness thereto, after the death of the testator. The contestants gave evidence of declarations of O., who was dead at the time of the trial, to the effect that the testator had made no will, and it was held competent for the proponents to prove in reply that O. had made declarations in the lifetime of the testator to the effect that the latter had executed a will. At first glance the case of *Robb v. Hackley*, *supra*, seems to be an authority against the district attorney's contention in the case at bar; but a careful reading of the opinion reveals Judge Bronson's recognition

of the very exception to the general rule which is relied upon to sustain the ruling in the case at bar. In the Robb Case the question was whether a note had been given and received in satisfaction of a debt. Evidence was given tending to show that the plaintiffs and their agent had admitted that the note had been taken in discharge of the debt. There the plaintiffs were allowed to show that their agent had previously written them a letter in which the transaction was described just as the agent had stated it in his testimony. The evidence was received, but on appeal was held incompetent, and for obvious reasons. The evidence was merely confirmatory of the testimony of a witness who had not been impeached, except by the usual contradiction inherent in a different version of the transaction.

This case of Robb v. Hackley has frequently been referred to as overruling the earlier case of *People v. Vane*, 12 Wend. 78, relating to the same subject, and it is therefore important to ascertain just how far the Robb Case went. That the decision is justified by the facts no one will deny, and it was with reference to those facts that Mr. Justice Bronson adverted to the ancient but long exploded doctrine that the testimony of any witness could be confirmed by proof of prior consistent statements. Let us note, however, what the learned jurist had to say about a case like the one at bar. "The referee was probably governed, in receiving the evidence, by the language of the late learned chief justice in *People v. Vane*, 12 Wend. 78; but that case does not necessarily go beyond deciding that the testimony of an accomplice in crime may be corroborated, by showing that when first arrested he gave the same relation of the facts which he had given on oath upon the trial. The fact that the accomplice was called as a witness for the people gave rise to the inference that he was criminating the defendant for the purpose of exempting himself from prosecution for the larceny. It might therefore be proper to show that he had given the same account of the matter at a time when there was no such motive for making a false accusation. If, when first arrested, and when he had no expectation of personal exemption,

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he had frankly disclosed the whole matter, that might tend to confirm his subsequent repetition of the same statement on oath. This brings the case within an acknowledged exception to the general rule, that the testimony of a contradicted, impeached or discredited witness cannot be confirmed by proving that he has made similar declarations out of court." 23 Wend. at page 53. This language could not be more apt if it had been written expressly for the case at bar. Upon examination of the case of *People v. Vane*, supra, where evidence of this character was received, it must be admitted that Chief Justice Savage stated this rule, or rather this exception to the general rule, much more broadly than was necessary for the facts of that case, for there the witness who was thus corroborated by his previous statements was an accomplice, just as Clark is in the case at bar. The real point of the matter is that *People v. Vane* decided that in a case where a witness is an accomplice he may be corroborated by proving his prior consistent statements made at a time when there was probably no temptation to falsify; and this decision was not disturbed by the subsequent holding in *Robb v. Hackley*, where the exception to the general rule, on which *People v. Vane* is based, was expressly recognized. And that was the view of the effect of *Robb v. Hackley*, taken by this court in *Gilbert v. Sage*, 57 N. Y. 639, and by the General Term in *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90, 95, and in *Herrick v. Smith*, 13 Hun, 446, 448. The case of *People v. Collier*, 141 App. Div. 111, 113, 125 N. Y. Supp. 725, is not an authority upon this question, for there the record discloses no change in circumstances between the time when the complaining witness made his statement to the magistrate and the time of the trial. The court simply received the complaint made to the magistrate in corroboration of the complaint at the trial, and it was properly held that there was no foundation for the evidence.

When we turn from the decisions in this state, we encounter an apparent diversity of authority, with a large preponderance in weight and number in favor of the admission of such evidence, and a small minority against its admissibility, but all
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conceding the existence of the one exception to the general rule which we think applies to the case at bar, namely, that, when the witness rests under the imputation of a recently formed motive to falsify, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of self-interest would have induced him to make a different statement from that which he actually made. And therefore a confession by an accomplice given before he has received a promise of personal exemption if he will become a state's witness may well be received as corroborating the testimony given by him on the witness stand. Thompson on Trials (2d Ed.) § 574 et seq., citing *Robb v. Hackley*, supra; *French v. Merrill*, 6 N. H. 468; *State v. Twitty*, 9 N. C. 449; *State v. Petty*, 21 Kan. 59; *Elliott on Evidence*, § 994; *Wharton on Crim. Ev.* (10th Ed.) vol. 1, § 492; *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; *State v. Flint*, 60 Vt. 304, 14 Atl. 178; *Stolp v. Blair*, 68 Ill. 544; *Wigmore on Ev.* vol. 2, § 1128; 3 Ency. of Ev. 736; *Walker v. People*, 209 Ill. 284, 70 N. E. 681; *Barkley v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; *Griffin v. Boston*, 188 Mass. 475, 74 N. E. 787. An examination of the authorities included in this long array will show that in most of them evidence of this character has been held admissible upon the true theory that it tends to support the integrity of the witness, no less than the accuracy of his recollection, where he has been impeached by evidence showing that he has testified under corrupt motives or has recently fabricated his testimony to meet the exigencies of the case (*City Pass. Ry. Co. v. Knee*, 83 Md. 79, 34 Atl. 252), and the limitations under which it should be received are well stated in *Maitland v. Citizens' Bank*, 40 Md. 540, 17 Am. Rep. 620, where Judge Alvey said: "The evidence * * * is not admitted to prove or disprove any fact involved in the issue on trial, but simply to corroborate or support the credibility of the witness * * * impeached."

On the other side of the question the decisions either distinctly admit that evidence of this character is competent in a case like this, or they show upon examination that they are not

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within the particular exception to the general rule. In *Conway v. State*, 33 Tex. Cr. R. 327, 26 S. W. 401, the charge was burglary. There the court received evidence to sustain the credit of a coprincipal by proving similar statements made by him after immunity had been promised him, and it was held on appeal that the evidence had been improperly received. But the appellate tribunal qualified its ruling by stating that when "an attempt has been made to prove or show that a witness is testifying under improper motives or influences, then, indeed, the party whose witness he is may prove that he made similar statements before he could have been affected by such influences, motives, or inducements." To the same effect is *People v. Doyell*, 48 Cal. 91, where the defendant was prosecuted for murder, although there the evidence was held improperly received on the theory that it was competent to support the witness, who had been contradicted by proof of his prior inconsistent statements, by showing that he had also previously made statements consistent with his testimony. In *Commonwealth v. Tucker*, 189 Mass. 479, 76 N. E. 127, 7 L.R.A.(N.S.) 1056, it was held that it was not proper to corroborate a witness for defendant in a homicide case after the prosecution had sought to impeach him by his prior statements inconsistent with his testimony by showing that he had also made earlier consistent statements. And the reason for the ruling is apparent. The witness was unimpeached except by the evidence which contradicted his testimony, and it could add nothing to his sworn statement to prove that he had previously made a similar unsworn statement. On the other hand, in a larceny case (*Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78), Mr. Justice Cooley wrote for a court which held that, in a case where there was conflicting evidence whether a witness made previous statements which were at variance with his testimony, it was competent to show that at an earlier time he had made a written consistent statement under conditions which were free from suspicion. On a prosecution for murder committed on the high seas, where the defense was insanity (*U. S. v. Holmes*, 1 Cliff. 105, Fed. Cas. No. 15,382), it was held incompetent to fortify

a witness who had testified to facts indicating the insanity of the defendant, by showing that he had previously stated these facts to members of the defendant's family; and in an action for damages for personal injuries resulting in permanent disability (*Reed v. N. Y. C. R. R. Co.*, 45 N. Y. 574), it was shown by the defendant that several months after the injury the plaintiff had performed physical and mental labor. There this court held that the plaintiff should not have been permitted to testify that at the time he performed this labor he complained of being ill to a person who was casually present.

Thus when we analyze these few cases which are cited as being authorities against the use of testimony to corroborate a witness under the imputation of recent improper influence or motive, we find that none of them touch the particular exception to the general rule under which such corroborating testimony has always been held proper, and some of them expressly admit the existence of the exception. The confusion in the authorities upon this subject is easily accounted for when we consider its history. Until the eighteenth century such corroborating evidence was received generally in all cases, even where the witness had not been discredited in any way. *Lutterell v. Reynell*, 1 Mod. 282 [1682]; *Hawkins*, P. C. Book 2, p. 607; 1 Greenleaf, Ev. 605. This was a rule well calculated to promote the trial of incidental issues, but it also lacked the support of sound reason. In the light of our modern experience it is obviously a mistake to suppose that an untrustworthy story can be made trustworthy by proving numerous repetitions of it; and equally illogical does it appear to be to attempt to support a credible witness and a reliable story by any such broken reed. In the early part of the eighteenth century the courts began to see the inconsistencies of this practice. In *Rex v. Parker*, decided in 1783 (3 Doug. 242; republished in 26 Eng. Com. L. Rep. 95), which was a prosecution for perjury, the deposition of a deceased witness was received in evidence, and then, on the cross-examination of a prosecutor's witness, he was permitted to swear to certain declarations of the deceased witness, not under oath, for the purpose of corroborating the facts stated in the

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deposition. Mr. Justice Buller, who spoke for the court, simply announced that the evidence was inadmissible and that *Lutterell v. Reynell*, supra, and the statement of Hawkins was no longer the law. This dictum has been widely and frequently cited to show that the old English rule applied in the *Lutterell Case* has been entirely swept away, just as our own case of *Robb v. Hackley* has been cited on both sides of the question. Thus, for instance, a well-known author cites *Smith v. Stickney*, 17 Barb. 489, as following the *Robb Case* in holding such evidence incompetent; and when we refer to the case itself we see that it only decides that a witness who has been impeached by evidence of prior inconsistent statements cannot be fortified by showing that he has on other occasions made statements which were identical with his testimony. And here again we find that Mr. Justice Welles recognized the exception to the general rule, for he said: "We can perceive nothing in the present case to bring it within the exception to the general rule."

In the effort to arrive at a proper decision upon this troublesome question we have written at much greater length than was at first thought necessary, and for the reasons given we conclude that the evidence of Clark's prior consistent statement was competent to support his testimony, upon the ground that he was impeached by the imputation of having sworn to a recently fabricated story from motives of self-interest. Upon principle and authority we regard that as one of the sound exceptions to the general rule that a witness may not be corroborated by what he has himself previously said.

The only remaining exceptions can be quickly disposed of. The witness Birmingham was allowed to testify, under objection and exception, that he had previously appeared before the grand jury, where he had testified concerning the same matter of which he was giving evidence at the trial. Here it is to be noted that his testimony before the grand jury was not produced or offered in evidence, nor was the witness permitted to state what he had sworn to, and the court flatly refused to allow him to state that his testimony before the grand jury was the same as at the trial. Surely the fact that he had testified before

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the grand jury, and that he had there been interrogated on the same matter as at the trial, was not prejudicial to the defendant, and yet that is all there is of the incident, as is clearly shown by a careful analysis of the questions put to him and the answer which he made. In this view of the matter it is unnecessary to go into further detail for the purpose of showing that Birmingham was in precisely the same position as Clark, and that his testimony before the grand jury, if properly proved, would have been competent to show that he then told the same story as he repeated at the trial. It suffices to say we have not that question before us.

The judgment of conviction should be affirmed.

CULLEN, C. J., and WILLARD BARTLETT and CHASE, JJ., concur. HISCOCK, COLLIN, and HOGAN, JJ., dissent.

Judgment of conviction affirmed.

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*(Court of Appeals, June, 1913.)***CLOWE, Respondent, v. SEAVEY, Appellant.**

(208 N. Y. 496, 102 N. E. 521. *Affg* 151 App. Div. 912, 135 N. Y. Supp. 1105.)

1. Bankruptcy — Contingent estate — Passes to trustee.

Under Real Property Law §§ 36, 40, 59, which divides expectant estates into future estates and reversions, and provides that a future estate is contingent "while the person to whom or the event on which

Note. — Alienability of contingent estates.

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1. *Revised Statutes*, 347.

2. *Real Property Law*, 348.

3. *Under statute creating the New York Produce Exchange*, 348.

c. *When interest passes to trustee in bankruptcy*, 351.

d. *When interest may be reached by judgment creditor*, 352.

a. In general.

A bare possibility of an interest which is uncertain, is not grantable, though a possibility coupled with a present interest may be granted. It has accordingly been held that a grant by an heir apparent of his interest in his ancestor's estate, so long as the ancestor is living, conveys nothing and is inoperative.

Kent's Com., Vol. 4, p. 261.

In *Picket v. Windecker* (73 Hun, 476, 26 N. Y. Supp. 437), a testator left certain land to his son during his natural life and one year thereafter, and if said son should have a child or children living at his death he gave said land to such child or children "and to their heirs and assigns, forever, to have the remainder after his death, and not before." The court

it is limited to take effect remains uncertain," and that "an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession," the interest of a bankrupt in the estate of her grandfather is alienable and passes to her trustee in bankruptcy, where such interest is created by a testamentary provision that "in the event of the death of my said son, and the remarriage of his said wife, should she survive him, I desire and direct my said trustees to pay to my said grandchildren, lawful children of my son, or their descendants, all the estate hereby devised to my son and his children as aforesaid."

2. Assignments — Contingent estate.

Under Real Property Law §§ 36, 40, 59, which divides expectant estates into future estates and reversions, and provides that a future estate is contingent "while the person to whom or the event on which

Alienability of contingent estates.—Continued.

held that it was obvious from the language of the will that the son took only a life estate in the lands in controversy, and that the remainder, after his death," vested in his children by virtue of the terms of the will, and that such vested remainder was alienable, and the interest of each child would pass by conveyance thereof.

Stover v. Eycleshimer (46 Barb. 84), had to do with an instrument authorizing a certain person, therein named, to demand, sue for, recover and receive all such interest, estate, property and effects, real and personal, which the signor of the instrument there had, or at any time thereafter might have or claim as heir at law, devisee, legatee or next of kin of his father. The court said: "All the right which the said John L. D. Eyclesheimer (the signor) possessed in the estate of his father, at the time of the execution of the instrument was a bare possibility coupled with no interest, and was therefore not the subject of a grant."

In *Matter of Stephens* (64 N. Y. Supp. 990), there was an assignment by a husband to his wife of all his right, title and interest, both present and prospective, that the assignor "may have by will, gift, or inheritance in the estate, real and personal, that said Horace A. Harman (assignor's brother) may leave at his death. The only objection to the assignment was that it was made 10 years before the death of the assignor. The court held that objection untenable.

In *Miller v. Emans* (19 N. Y. 384), there was a devise to Mrs. Miller, upon the contingency that she should survive either of her brothers or sisters who should die *sine prole*. Her interest she released to her broth-

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it is limited to take effect remains uncertain," and that an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession," there is no distinction between uncertainty of person and uncertainty of event with respect to the alienability of contingent interests.

8. Bankruptcy — Fraudulent transfer — Transferee's intent.

A person cannot put his property beyond the reach of his creditors by a transfer which secures it to himself and his children, even though the transferee had no intent to hinder, delay or defraud the creditors of the transferor.

Appeal from a judgment of the Appellate Division, Third Department.

Alienability of contingent estates.—Continued.

ers. The court held that the release was valid as a conveyance of a contingent estate.

In *Freeborn v. Wagner* (2 Abb. Dec. 175, 43 N. Y. (4 Keyes) 27), an estate was devised to two persons with a provision that in case of the death of one without issue the survivor would take the whole. The two devisees joined in a conveyance of the land with a covenant of warranty. The court held that the conveyance passed all the title of the grantors, either vested or contingent.

On the alienability of a future contingent interest in personal property, Mr. Justice Miller, in *National Park Bank v. Billings* (144 App. Div. 536, 129 N. Y. Supp. 846), said: "For what reason or upon what principle can it be said that a future contingent interest in personal property is not assignable at law as well as in equity? Not because such right or interest does not exist, because it is a present right, which cannot be defeated by the act of a third party, and which will ripen into an estate in enjoyment upon the happening of a contingency. If there is now any rule against the assignability of such an interest, it must exist as a remnant of an ancient rule adopted to prevent the oppression of the weak by the strong, when it was supposed that both did not have an equal chance in the courts of justice." In that case it was held that a future contingent interest in personal property could be reached by a judgment creditor.

By the will construed in *Griffin v. Shepard* (124 N. Y. 70, 26 N. E. 339), the testator left one-third of his real property to one of his sons

Action by Charles W. Clowe, trustee in bankruptcy to set aside a transfer made by Elizabeth S. C. Seavey, the bankrupt.

Henry J. Hemmens, of New York City, for defendant-appellants.

Edgar T. Brackett, of Saratoga Springs, for plaintiff-respondent.

MILLER, J. This action is brought by a trustee in bankruptcy to set aside a transfer made by Elizabeth S. C. Seavey, the bankrupt, to her mother-in-law of all her right, title, and interest, present and future, in and to the estate of her grand-

Alienability of contingent estates.—Continued.

provided his other son died before his wife and without issue living to the age of twenty-one years. The first son conveyed his interest in the estate to the second son. The second son died before his wife and without issue. The court held that the first son had a future expectant estate in the one-third of the property which he could convey to his brother.

In *Ham v. Van Orden* (84 N. Y. 257), the will showed a gift to one of testator's sons of a fourth part of his estate to be held in trust for the life use of his other son with the further provision that upon the death of the beneficiary it should be equally divided among the children of the beneficiary, or in case he left no children him surviving, then it should be divided between his first-named son and his daughter. The said son and daughter gave the said life beneficiary a release and quit-claim of their interest in said one-fourth part of the estate. The said beneficiary died without issue, and the daughter (the plaintiff) sued the first named son (the defendant) for her one-half of said one-fourth part of the estate. In only that the interest of the daughter was transferred by the release or quit-claim the court said: "It does not seem necessary to determine whether an interest at once vested in her or whether time and the happening of the specified event were of the substance of the gift, and prevented it from vesting until the event happened. In either case she acquired an interest * * * although the right to possession was postponed to a future period and depended upon the contingency of the death of Wessel without children. This did not prevent the creation of the estate but rendered it liable to be defeated. * * * It was an estate in expectancy, however, and could not be destroyed by any alienation, or other act of Wessel or his trustee, and upon his death, without children,

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father. She had no other property. The court found upon sufficient evidence that she made the transfer with intent to cheat and defraud creditors, and in effect that it was voluntary except for the sum of \$1,000, loaned by the transferee upon the security of it. The court also found that the transferee did not participate in said fraudulent intent. The judgment provides for the repayment of said loan with interest. The instrument of transfer was executed by both parties. The transferee expressly agreed that in consideration of the transfer she would devise and bequeath the estate transferred to her as well as all of her other estate, in trust for the use of the transferor and her husband during their lives and the life of the survivor, with re-

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would become absolute in the plaintiff. It was therefore, alienable by her to the same extent as if in possession, and whether it be deemed vested or contingent."

The court in *Stringer v. Baker* (110 App. Div. 37, 96 N. Y. Supp. 1052) held that an assignment of a future estate in expectancy was valid, whether it was vested or contingent.

b. Under statutes.

1. Revised Statutes.

The term "real estate," as used in the statute, relating to the "title to real property by descent" (1 R. S., ch. 2, pt. 2, p. 751, § 27), is declared to include every estate, interest and right, legal and equitable, in lands, etc., except such as are extinguished by the death of an intestate, seized or possessed thereof, or in any manner entitled thereto.

Dodge v. Stevens, 105 N. Y. 585, 12 N. E. 759.

The court in *Moore v. Littel* (41 N. Y. 66), held that where property was left to one for his natural life, with remainder to his heirs, the children of the life tenant had an interest, which, whether vested or contingent, was alienable.

By the will construed in *Van Ness v. Day* (7 Albany L. J. 172), property was left to two persons for life, the children of the second life tenant to receive the remainder. The court held that even during the life of the first life tenant, a child of the second had an alienable interest.

mainder to their son. The particular clause of the will creating said interest reads as follows: "In the event of the death of my said son, and the remarriage of his said wife, should she survive him, I desire and direct my said trustees, John B. Clement and John Cox, to pay to my said grandchildren, lawful children of my son Henry S. Clement, or their descendants, all the estate hereby devised to my son, Henry S. Clement, and his children, as aforesaid. * * *"

It is of no consequence that the transferee had no intent to hinder, delay, or defraud the creditors of the transferor. A person cannot successfully put his property beyond the reach of his creditors by a transfer which secures it to himself and his

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By this will considered in the case of *Dodge v. Stevens* (105 N. Y. 585, 12 N. E. 759), the testator devised certain premises to his wife so long as she remained his widow, and in case she should not again marry, he gave them to her in fee, but in case she remarried then he devised the same to his daughter in fee. The court held that the interest or right of the daughter was a contingent future estate, and was by the very language and classification of the statute (1 R. S. 722), an estate in land, and was therefore the subject of sale.

2. Real Property Law.

In *New York Life Insurance & Trust Co. v. Cary* (191 N. Y. 33, 83 N. E. 598), a so-called trust deed of personal property reserved to the grantor the reversion thereof in the event of the death of the beneficiary leaving no issue. The court held that this was an estate in expectancy, and as Real Property Law, § 49 provided that an expectant estate "is descendible, devisable and alienable in the same manner as an estate in possession," the word alienable in the statute empowered the owner of the expectant estate to deal with the same in all respects as he might if he were actually in possession of the property representing the estate.

3. Under statute creating the New York Produce Exchange.

In *Holmes v. Seamen* (184 N. Y. 486, 77 N. E. 724), the court held that the interest of the beneficiaries in the gratuity fund of the New York Produce Exchange was assignable to one who had protected and kept alive their rights and interest by making payments into such fund, for

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children, even though the transferee may have the best of motives, and be ignorant of his fraudulent intent.

The important question in the case is whether the interest of the bankrupt passed to the trustee in bankruptcy. Curiously enough the inalienability of that interest is asserted by those who claim under an assignment of it. It is forcibly urged by the learned counsel for the respondent that said interest is a vested remainder. However, we do not consider it necessary to determine whether it was vested or contingent, because we are of the opinion that in either view it was alienable.

It was decided in *National Park Bank of N. Y. v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846; Id., 203 N. Y. 556,

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the purpose of the repayment of such moneys. The gratuity fund of the New York Produce Exchange was established pursuant to chapter 36 of the Laws of 1882, which authorized the corporation to make provision for the widows and families of deceased members, and provide for an assessment of such sum as should be fixed in the by-laws of the corporation upon the death of any member, which sum or such proportion thereof as the by-laws might provide, and such proportion of the surplus income of the corporation as the by-laws might provide, might be paid to the widow, children, next of kin or other persons dependent upon said deceased member, in such manner as the by-laws should prescribe. Among the by-laws relating to the gratuity fund established under the authority of this statute, was the following: "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts, but it shall be construed as the solemn agreement of every subscribing member of the New York Produce Exchange to make a gift to the family of each deceased member, and of the exchange to collect and pay over to the family the said gift."

The court in *Holmes v. Seaman*, *supra*, in referring to the case of *McCord v. McCord* (40 App. Div. 275, 57 N. Y. Supp. 1049) said: "So far as the *McCord* case decides that a beneficial interest in the gratuity fund of the New York Produce Exchange could not be assigned as security for a pre-existing debt, and that no valid charge could be made thereon, for any future indebtedness outside of payments necessary to keep alive the interest of the beneficiaries in the fund, we think that the decision was correct. We are unable to approve it, however, so far as it denies to a beneficiary in the gratuity fund the power to charge his interest with the

96 N. E. 1122, that future contingent interests in personal property were alienable, the same as contingent remainders in real property, but it is argued that that case is distinguishable in that in this case the persons who are to take cannot be ascertained until the death of the life beneficiary. The writer did observe in that case that there was no uncertainty of the person, and it has been stated by text-writers, and often assumed by judges, that contingent interests are mere possibilities, and not alienable, where there is uncertainty of the persons who are to take. That doctrine had its origin in conditions which no longer exist. It did not survive the adoption of the Revised Statutes, which divided expectant estates into (1) future estates, and (2) reversions, and provided that a future estate

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repayment of such amounts of money as may be paid by another to maintain that interest in existence, and without which payments it must have been absolutely destroyed. To hold that this may not be done would be to defeat the manifest purpose of the by-laws, as expressed by Mr. Justice Cullen in *Kemp v. New York Produce Exchange* (34 App. Div. 175, 54 N. Y. Supp. 678), where he declared it to be the intention to create a provision for the family of a deceased member which should be beyond the hazard of loss from pecuniary misfortune. Take the case of the wife or child of a member of the exchange who had paid his dues and assessments for years and suddenly found himself unable to pay them any longer. The wife or child is equally destitute. None of the parties in interest has any means whereby to provide for the payment of the assessments, without which the right of the wife or child to receive anything whatever from the gratuity fund will at once cease and determine. If the provision in the by-laws against any assignment is deemed to be a prohibition against creating a charge upon the beneficial interest which will reimburse a third party for advances made to prevent its destruction, then under such circumstances all that has been paid by the member during his lifetime will go for naught, and the widow or orphan will be left penniless. A construction which will have this effect should not be adopted unless it is the only construction of which the by-law is capable. Taking into consideration the plain object in view in the establishment of the gratuity fund and the enactment of the by-law we think it must be held to warrant and justify the creation of such a charge as was made upon it by the execution of the first assignment in this case.

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is contingent "while the person to whom or the event on which it is limited to take effect remains uncertain," and that "an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession." R. S. pt. 2, c. 1, titl. 2, §§ 9, 13, and 35; now Real Prop. Law (Cons. Laws, c. 50) §§ 36, 40, 59. Those provisions are plain and simple, and leave no room for the refinements of the ancient common law.

Assuming the interest of Mrs. Seavey under her grandfather's will to be contingent, it will be extinguished by her death before the death of her father. If the person to take were certain, and the event uncertain, the contingent interest or estate would never vest in possession, unless the event happened. The statute makes no distinction between uncertainty of person and

Alienability of contingent estates.—Continued.

c. When interest passes to trustee in bankruptcy.

In *Van Heusen v. Van Heusen Charles Co.* (74 Misc. 292, 131 N. Y. Supp. 401), the court held that the plaintiff's interest in his father's estate was contingent, and would not pass to the trustee in bankruptcy. The contingency in that case was "that only those members of the class shall enjoy the remainder in possession who are alive at the death of the life tenant." Although this case is not mentioned by the court in *Clark v. Grosh*, *infra*, or in the text case, it nevertheless is not in accord with the holding in those cases, and must of necessity be overcome by them.

In *Clark v. Grosh* (81 Misc. 407, 142 N. Y. Supp. 966), the life use of property was left to the daughter of testatrix. After such life use the property was left to testatrix' son "should he be alive at the death of my said daughter" and "should he be dead at the time" testatrix directed the property to be divided equally between "his then living children share and share alike." The son died before his sister leaving him surviving, among others, a son who was at the time in bankruptcy, and the question as to whether the son's interest in the estate passed to his trustee in bankruptcy was answered by the court in the affirmative. The court said that the interest of the son was an estate in expectancy and that under § 59 of the Real Property Law it was descendible, devisable, and alienable." The court further stated that under §§ 36 and 40 of the same law it was a future contingent estate and assignable. To quote: "It accords with the progress of the age that every right and interest may be assigned. The defendant Mattison had a right which might or might not ripen into

uncertainly of event, and there is no sound reason to make such a distinction with respect to the alienability of contingent interests. Whatever the uncertainty, they are defined by the statute as estates. Of course, the contingency may be such that the interest or estate is not transmissible, descendible, or devisable, but so far as the nature of the contingency admits, all expectant estates are descendible, devisable, and alienable. The interest of Mrs. Seavey is certain to vest in possession and enjoyment if she survives the event, and there is no substantial difference between this case and *National Park Bank of N. Y. v. Billings*, supra. In that case, as in this, the interest was contingent upon survivorship, but in this case, as in that, it is not subject to the will of a third party, and is more than a mere possibility, e. g., the chance of sharing as next of kin in the estate of another upon his death, or "that which the heir has from the courtesy of his ancestor," or a mere possibility of reverter, which was involved in *Upington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359, 37 L.R.A. 794.

We should not introduce subtleties into the plain rule of the statute, unless constrained to do so. It will not be profitable to discuss in detail the many cases cited by the appellants. Expressions may be found in judicial opinions which, apart from their context, may seem to support the distinction sought to be

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possession. Reason and precedent at this time are to the effect that he may dispose of such right, and that his assignee will get the benefit of whatever right might thereafter accrue to him (*Mattison*) but for the transfer of such right. The right may be called a possibility, a chance, or by any other name, yet it is a property right, and by virtue of the Bankruptcy Act, will pass to his trustee, and this whether such interest is called vested or contingent."

d. When interest may be reached by judgment creditor.

Future contingent interests in personal property are alienable, the same as contingent remainders in personal property. *National Park Bank of New York v. Billings* (144 App. Div. 536, 129 N. Y. Supp. 846). In that case the life use of personal property was given to testator's wife, and

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made between uncertainty of person and uncertainty of event, but it is sufficient to say that the precise point has already been decided by this court in favor of the respondent, and that the cases relied upon by the appellants did not deal with it.

Jackson v. Waldron, 13 Wend. 178, and Edwards v. Varick, 5 Denio, 664, are only of historical interest. They involve an assignment made in 1804. Their authority even as to the common law was much weakened, if indeed they were not overruled, in Miller v. Emans, 19 N. Y. 384. Moore v. Littel, 41 N. Y. 66, was the first authoritative decision on the effect of the Revised Statutes. It involved a grant made in 1832 to one John Jackson "for and during his natural life, and after his decease to his heirs and their assigns forever." The question was whether the children of John Jackson had an interest in the premises which they could convey during his life. Judge Woodruff was of the opinion, first, that the remainders were vested, and, second, that if contingent, they were alienable under the Revised Statutes, although the uncertainty was as to the persons. A majority of the court concurred on the latter ground, as was pointed out by Judge Finch in Hennessy v. Patterson, 85 N. Y. 91, 104. While Moore v. Littel has sometimes been criticized, it has never been overruled, but has been cited many times as authority for the proposition that contingent es-

Alienability of contingent estates.—Continued.

after her death the property was to be divided equally between the son and daughter if they were then living, the son's share also depending on his reaching 25 years. The court held that the son's interest was a future contingent estate which was subject to the claims of creditors.

The defendant in Cohalan v. Parker (138 App. Div. 849, 123 N. Y. Supp. 343), had an interest in the remainder of two separate trusts created by the testator. The court in holding this interest the subject of sale under the judgment said: "The appellant contends that one of the remainders is contingent, and therefore not the subject of sale. We are cited to no statute or rule of law which prevents the sale of a remainder interest whether vested or contingent, and the statute expressly provides that an expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession."

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tates are alienable. *Ham v. Van Orden*, 84 N. Y. 257, 270; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 213; *Dodge v. Stevens*, 105 N. Y. 585, 588, 12 N. E. 759; *Griffin v. Shepard*, 124 N. Y. 70, 76, 26 N. E. 339; *Matter of Pell*, 171 N. Y. 48, 54, 63 N. E. 789, L.R.A. 540, 89 Am. St. Rep. 791; *Roosa v. Harrington*, 171 N. Y. 341, 353, 64 N. E. 1; *Baltes v. Union Trust Co. of N. Y.*, 180 N. Y. 183, 187, 72 N. E. 1005.

It seems strange that the question should still be thought open. It should be set at rest. We adhere to the ruling of *Moore v. Littel* not alone because it has been recognized as authority so long, but because that ruling gives effect to the plain language of the statute. I may add that the rule is the same in Massachusetts. *Putnam v. Story*, 132 Mass. 205; *Whipple v. Fairchild*, 139 Mass. 262, 30 N. E. 89.

The judgment should be affirmed, with costs.

CULLEN, C. J., and WILLARD BARTLETT, CHASE, CUDDEBACK, and HOGAN, JJ., concur. GRAY, J., not voting.

Judgment affirmed.

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(*Court of Appeals, March, 1914.*)

PEOPLE ex rel. KINGS COUNTY LIGHTING CO.,
Respondent, v. WILLCOX, Appellant.

(210 N. Y. 479, 104 N. E. 911. *Affg in part* 156 App. Div. 603, 141 N. Y. Supp. 677.)

1. Public service corporation — "Going value" — Rate making.

"Going value" as distinct from "good will," is to be considered in valuing the property of a public service corporation, either for the purpose of condemnation or rate making.

Note. — "Going value" as an element of value of a public service corporation plant.

The judges of the courts of this state had not, before the text case was brought into the courts, considered the question presented by this note. As the question of the control and management of public service corporations, especially with regard to rate making, has recently assumed importance, our reports will undoubtedly in the future contain more and more cases bearing upon the subject. It is therefore deemed advisable to use this as a leading case in this series of annotated cases.

As the court in the text case concurred fully in what Mr. Justice Clarke said, in his opinion below (156 App. Div. 603, 141 N. Y. Supp. 677), on the subject of "going value," it will be well to quote from the opinion:

"In *Omaha v. Omaha Water Company*, 218 U. S. 180, 30 Sup. Ct. Rep. 615, 54 L. ed. 991, the question was as to the amount to be paid by a municipality on taking over a system of waterworks. Nearly \$600,000 had been allowed by the appraisers for going value. The court said: "The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value and is independent of any franchise to go on, or any mere good will as between such a plant and its customers * * *

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2. Public service corporation — "Going value" — Definition.

"Going value" for rate purposes is an amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property.

3. Public service corporation — "Going value" — As separate from tangible property.

"Going value" has no existence apart from tangible property, but it must be appraised separately from the physical property.

4. Public service corporation — "Going value" — How appraised for rate making.

"Going value" is to be appraised by showing the actual experience

"Going Value" as an element of value of a public service corporation plant.—Continued.

That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company's plant, and the commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L.R.A. 827, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned justice, and shall not try to. That case has been approved and followed in *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365 (60 N. E. 977), and *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565 (57 Atl. 746). No such question was considered in either *Knoxville v. Knoxville Water Co.*, 212 U. S. 1 (29 Sup. Ct. Rep. 148, 53 L. ed. 371), or in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19 (29 Sup. Ct. 192, 53 L. ed. 382, 15 Ann. Cas. 1034). Both cases were rate cases, and did not concern the ascertainment of value under contracts of sale." It is true the question has not been directly decided in a rate case in the United States Supreme Court. In the *Knoxville Case*, *supra*, Mr Justice Moody said of the valuation: "It was made up by adding to the appraisement in minute detail of all the tangible property the sum of \$10,000 for 'organization, promotion, etc.,' and \$60,000 for 'going concern.' The latter sum, we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case." And the United States Supreme Court

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of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the cause under consideration.

5. Public service corporation — Gas company — Rate making — What considered.

For the purpose of rate making, a gas company is not entitled to have the cost of reproduction of paving, which was not in place at the time its mains were laid, allowed for in ascertaining the value of

"Going Value" as an element of value of a public service corporation plant.—Continued.

again left the question undecided in *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 665, 669, 32 Sup. Ct. 389, 390 (56 L. ed. 594), Holmes, J., saying: "Then again, although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. * * * In this case the court fixed a value on the plant that considerably exceeded its cost and estimated that under the ordinance the return would be over 6%. Its attitude was fair, and we do not feel called upon to follow the plaintiff into a nice discussion of details." But "going value" has been considered and allowed for in the following rate cases: *Missouri, Kansas & Texas R. R. Co. v. Love* 177 Fed. 493, 496; *Shepard v. Northern Pacific R. R. Co.*, 184 Fed. 765, 810; *Des Moines Water Co. v. Des Moines*, 192 Fed. 193, 197; *Pioneer Tel. & Tel. Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L.R.A.(N.S.) 1209; *Public Service Gas Co. v. Board of Commissioners*, (N. J. Sup.) 87 Atl. 651. I am unable to perceive a logical difference between allowing "going value" in the valuation of a plant when it is to be taken entirely by the public and allowing the same element when valuing the same plant for rate making purposes. In each case the thing to be done is the fair appraisement of present value. What difference in principle can there be because in one instance all is taken for the use of the public and in the other the public limits the earnings? In the case at bar the Commission says it "disallowed this claim in determining fair value, * * * but did consider it in fixing the rate of return." If so, there is no proof of that fact in the record."

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its property used in the public service or in ascertaining the capital actually expended.

6. Public Service Commission — Rate making — What considered — Appreciation in land value.

For the purpose of rate making, the Public Service Commission cannot, in ascertaining the amount which should constitute a proper return, consider as part of what accrues to the relator as gross receipts of its yearly operations the annual appreciation in the value of its land.

Appeal from an order of the Appellate Division, First Department.

Certiorari by the People, ex rel. Kings County Lighting Co. against William R. Willcox and others (Public Service Commission, First District), to review an order of the Commission establishing rates.

George S. Coleman and *Oliver C. Semple*, both of New York City, for defendant-appellants.

O'Brien, Boardman & Platt, of New York city (*Morgan J. O'Brien*, of New York City, *James F. Meagher*, of Chicago, Ill., and *Swinburne Hale*, of New York City, of Counsel), for plaintiff-respondent.

MILLER, J. The relator was organized in 1904, and merged with the Kings County Gas & Illuminating Company, which was organized in 1889, and began supplying gas in October, 1891. The Appellate Division held that the determination of the commission was wrong in three respects, which are presented by four questions certified for review, viz.: (1) Was the relator entitled, upon the facts shown in the record, to have the Commission make an allowance for going value in determining the value of the relator's property used in the public service? (2) Was the relator entitled, upon the facts shown in the record, to have the cost of reproduction of paving now in the streets, but not in place at the time the mains were laid, allowed for in

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ascertaining the value of its property used in the public service? (3) Was the relator entitled, upon the facts shown in the record, to have the cost of reproduction of paving now in the streets, but not in place at the time the mains were laid, allowed for in ascertaining the capital actually expended? (4) Was the commission entitled, upon the facts shown in the record, in ascertaining the amount which should constitute a proper return, to consider as part of what accrues to the relator as gross receipts of its yearly operations the annual appreciation in the value of its land?

It is now generally recognized that "going value," as distinct from "good will," is to be considered in valuing the property of a public service corporation, either for the purpose of condemnation or rate making but there is a wide divergence of view as to how it is to be considered. The commission in this case says it was taken into account in valuing the plant as a "going" and not as a "defunct or static" concern, and that it was also considered in fixing the fair rate of return. The Appellate Division says that there is no proof of the latter fact in the record. Thus the first question certified requires us to decide whether "going value" is to be appraised as a distinct item, or whether it is sufficient to regard it as something vague and indefinable to be given some consideration, but not enough to be estimated. The valuation of the physical property was determined by ascertaining the cost of reproduction less accrued depreciation. Preliminary and development expenses prior to operation were included, but no allowance was made for the cost of developing the business. By that method the plant was valued in a sense as a "going concern." In other words "scrap" values were not taken; but to say that that sufficiently allows for "going value" is the same as to say that "going value" is not to be taken into account. The problem is to determine what is fair to the public and the company. The public is entitled to be served at reasonable rates, and the company is entitled to a fair return on its investment on the value of the property used by it in the public service. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego Land & Town Co. v. Nation-*

al City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511. It would have been entitled to a return on the valuation adopted by the commission, if it had no customers, but was just ready to begin business, whereas it had a plant in operation with an established business, which every one knows takes time, labor, and money to build up.

If "going value" is capable of ascertainment, it will not do for the commission vaguely to consider it in fixing the fair rate of return. That no appreciable allowance was made in this case is shown both by the rate fixed and by the following statement in the opinion of the commission: "It should be noted that the plant has been in operation for nearly 20 years, and it might be argued with considerable force that two decades should be sufficient for the company to recoup its early deficiencies below a fair rate of return, if any such deficiencies ever existed. If the company has not recouped itself by this time, under such circumstances it is doubtful whether the present consumers ought to be burdened for this reason."

The first question certified then resolves itself into two heads: (1) Is "going value" a distinct item to be appraised and included in the base upon which the fair return is computed? (2) Was the evidence in this case sufficient to justify an allowance for it?

The opinion of Mr. Justice Clarke below saves me the necessity of citing and analyzing the cases bearing on the first branch of the question. We concur fully in what he has said on the subject and in his conclusion that there is no "logical difference between allowing 'going value' in the valuation of a plant when it is to be taken entirely by the public and allowing the same element when valuing the same plant for rate-making purposes." A case since decided should be added to the rate cases cited by him in which "going value" has been allowed, i. e., *Public Service Gas Co. v. Board of Commissioners* (N. J. Sup.) 87 Atl. 651.

It is no answer to say that in condemnation cases the exchange

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value is taken, and that that depends on the rates charged, the thing to be determined in rates cases. Of course, a rule of valuation might be adopted in a condemnation case which would not work in a rate case; but if the cost of reproduction, less depreciation, rule be adopted, as appears to have been done in *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L.R.A. 827, and *City of Omaha v. Omaha Water Co.*, 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991, the leading condemnation cases in the federal courts, in which "going value" was considered, it is impossible to see why the "going value" could not be determined in both classes of cases in precisely the same way.

The difficulty of determining the "going value" will not justify the disregarding of it. Rate making is difficult. But that will not justify confiscation. The difficulty, however, will lessen, as it does in most cases, when we cease to think about the subject vaguely. What then, is "going value," and how is it to be appraised?

It takes time to put a new enterprise of any magnitude on its feet, after the construction work has been finished. Mistakes of construction have to be corrected. Substitutions have to be made. Economies have to be studied. Experiments have to be made, which sometimes turn out to be useless. An organization has to be perfected. Business has to be solicited and advertised for. In the case of a gas company, gratuitous work has to be done, such as selling appliances at less than a fair profit and demonstrating new devices to induce consumption of gas and to educate the public up to the maximum point of consumption. None of those things is reflected in the value of the physical property, unless, of course, exchange value be taken, which is not admissible in a rate case. The company starts out with the "bare bones" of the plant, to borrow Mr. Justice Lurton's phrase in *Omaha Water Works Case*, *supra*. By the expenditure of time, labor, and money, it co-ordinates those bones into an efficient working organism, and acquires a paying business. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much

a part of the investment of the company as the cost of physical property.

The investors in a new enterprise have to be satisfied as a rule with meager or no returns while the business is being built up. In a business subject only to the natural laws of trade, they expect to make up for the early lean years by large profits later. In a business, classified among public callings, the rate-making power must allow for the losses during the lean years, or their rate will be confiscatory, and of course will drive investors from the field. In the former class, the value of the established business is a part of the "good will," and may be determined by taking a given number of years' purchase of the profits, or exchange value may be considered. In the latter case, a different rule must be adopted.

Referring again to the Ames Case, *supra*, the public is entitled to be served at reasonable rates, and the corporation is entitled to a fair return on the property used by it in the public service, no more, no less, always assuming, of course, that the return is computed on a proper valuation. That was not made so by statute, but was the rule at common law, which justifies Legislatures and commissions in fixing rates. If then a public service corporation has received more or less than a fair return, it has received more or less as the case may be, than was its due, irrespective of whether a rate had been fixed by public authority. If a deficiency in the fair return in the early years was due to losses or expenditures which were reasonably necessary and proper in developing efficiency and economy of operation and in establishing a business, it should be made up by the returns in later years. If there was a fair return from the start the corporation has received all it was entitled to, irrespective of how much of the earnings may have been diverted to the building up of the business.

To view the matter in another aspect, take the case of a public service corporation with a plant constructed just ready to serve the public. It is going to take time and cost money to develop the highest efficiency of the plant and to establish the business. Three courses seem to be open with respect to rate making,

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viz.: (1) To charge rates from the start sufficient to make a fair return to the investor and to pay the development expenses from earnings, a course likely to result in prohibitive rates, except under rare and favorable circumstances; (2) to treat the development expenses as a loss to be recouped out of earnings, but to be spread over a number of years, in other words, as a debt to be amortized—that involves complications, but would seem to be fairer to the public, and certainly more practical than the first; (3) to treat the development expenses, whether paid from earnings or not, as a part of the capital account for the purpose of fixing the charge to the public. The last course would seem to be fairest to both the public and the company, as well as the most practical.

It may be, as is urged, that a well-conducted enterprise will charge the cost of developing the business to operating expenses, and that it would open the door to an overissue of securities to permit the capitalization of early losses. In answer, it is sufficient to say that we are dealing, not with proper methods of bookkeeping, not with the proper capitalization upon which to issue securities, but solely with the fair return which the company is entitled to receive from the public. Treating a reasonably necessary and proper outlay in building up a business as an investment for the purpose of determining the fair rate of return to be charged is far from holding that it should be treated as capital, against which securities might be issued.

We do not say, as matter of law, that the third course above outlined should be adopted as an original proposition. That may present a question of economics, depending on the particular conditions involved. The commission in this case had to determine the rate to be charged, not by a new company with no business, but by an old company with an established business. The first question, therefore, to determine on this branch of the case was whether the company had already received a fair return on its investment. If it had received such return from the start, or if in later years it had received more than a fair return, the public would already have borne the expense of establishing the business in whole or in part, and

to that extent the question of "going value" for the purpose of fixing a present rate would be eliminated; for it must constantly be kept in mind in dealing with this problem that the company is entitled to a fair return and no more. If it has already had it, that is the end of the matter. If it did not receive a fair return in the early years, owing to the establishment of the business, a subsequent rate must allow for that loss, or it will be confiscatory. Now, no dividends appear to have been paid by the original company, or by the relator, prior to 1907. Assuming a reasonable need of the service from the start, and that the failure to pay dividends was not due to bad management, an accumulation of a surplus or undivided profits, the investment of earnings, in permanent additions or betterments allowed for in the structural valuation, or to other causes besides those under consideration, none of which is asserted, it would seem plain that "going value" was an element in this case which the commission was required to determine in making an appraisal on which to compute the fair return to which the company is entitled.

It is urged that an unprofitable business will thus have a greater value for rate-making purposes than one profitable from the start. That again overlooks the fundamental consideration that a public service corporation is entitled to a fair rate of return from the beginning of its investment and no more. If the shareholders have been deprived of a fair return on their investment because of the time and expense reasonably and properly required to build up the business, they have, to the extent of that deprivation, added to their original investment and are entitled to a return upon it. If, however, a fair return in addition to the expense of building up the business has been earned from the start, the public, not the shareholders, have paid the development expenses. We are dealing, not with exchange value, but with the value upon which the company is entitled to earn a return. In this connection it is to be observed that the statements in the opinions of the courts, in reference to computing the fair rate of return on present values, have for the most part been made in cases in which the precise ques-

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tion under consideration was not directly involved, and in which no attempt was made to limit the elements composing the problem. Manifestly a rate computed on the cost to-day of reproducing the bare plant would not be fair. Experience is proverbially expensive. With the advantage of that experience the same or an equally efficient plant could be constructed to-day at a cost much below the actual and necessary investment of the company in both plant and experience. Indeed, wholly apart from the intangible thing called the going business, the reproductive value to-day of the physical property would not necessarily include the actual and legitimate investment in tangible property which may have been entirely replaced, not because of depreciation, but to meet advances in mechanical science, new conditions and increasing demands not reasonably to have been foreseen at the start. I am not now speaking of replacements made with fresh capital, about which there is no question in this case. The term "going value," though not exactly defined, has been used quite generally to comprise the elements not included in the structural value of the property in its present condition. The term is not important. The point is that in some manner and under some appropriate heading a due allowance must be made for the investment in those elements. No inflexible rule will in the long run be just both to the public and the corporation. The right to limit the corporation to a fair return fixed by public authority necessarily involves the correlative right in the corporation to be assured of that fair return during all the time that its capital is employed in the public service. The statute governing this case (Public Service Commissions Law [Consol. Laws, c. 40] § 72) provides: "In determining the price to be charged for gas * * * the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

Of course, a reasonable need for the service from the start and reasonably good management are assumed. While, within reasonable limits, service may be provided for anticipated needs, a company should not construct a plant in a wilderness and, after a city has been built around it, expect to recoup its losses while waiting, nor should it expect to recoup losses from bad management. I do not include in the latter mere mistakes or errors in judgment which are almost inevitable in the early stages of any business. The fair return is to be computed on the actual investment, not on an overissue of securities, and the failure to pay dividends to the investors must be due to the causes under consideration, not to an accumulation of a surplus or to expenditures for permanent additions or betterments, which are included in the appraisal of the physical property; in other words, the actual net earnings are to be taken. Making proper allowance for the matters just considered and perhaps for others which do not now occur to me, I define "going value" for rate purposes as involved in this case to be the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property.

It may be conceded that going value has no existence apart from tangible property, and that commercially there is but one value, that of the property as a whole, but as the rate cannot be made to depend upon the exchange value, which would in turn depend upon the rate, it would seem to be necessary to appraise the physical property and the going value separately, and of course that is the case if the cost of reproduction rule be adopted.

It remains to consider how "going value" is to be appraised. That presents a question of fact, the determination of which is primarily within the province of the rate-making body. It is proper for this court, however, to indicate a permissible method or methods, as in *People ex rel. Jamaica W. S. Co. v. State Board of Tax Com'rs*, 196 N. Y. 39, 89 N. E. 581, it indicated

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a rule for valuing a special franchise for taxing purposes, which has generally been followed.

Obviously, the most satisfactory method is to show the actual experience of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration. The business in this case was 20 years old, the books of the old company were not available, and it is of course problematical whether, if produced, they would have shown the necessary facts. The question, therefore, had to be determined, as all questions of fact have to be, by the best evidence available. Here, I may repeat that mere difficulty in the proof would not justify a confiscatory rate. The value of the physical property was shown by opinion evidence as to the cost of reproduction. The same kind of evidence was given by two witnesses for the relator as to the cost of building up the business to its present state. In the appellants' brief it is said that they were men "of mature age and much experience." One witness said that \$30 a meter was an arbitrary sum usually adopted by engineers as the cost of building up such a business, and he put the cost in this case at \$600,000. Another witness estimated the "going value" to be \$781,916. He explained at length how he arrived at that figure. He assumed the existence of two plants, situated exactly alike in the same community and with the same physical property: (1) The actual plant with its established business; (2) a suppositional plant with no business. He then estimated the length of time and expense required by the second plant to develop its business to the stage and revenue of the actual plant. There would appear to be as good ground for admitting the opinion of a qualified expert on such a subject as on the cost to reproduce the physical prop-

erty. Of course, the commission was not bound by that evidence. It had in addition the experience of the relator and its predecessor as to payment of dividends, the amount of capitalization of both, and the value of the physical property in its present condition determined as above stated. With nothing opposed to those facts and the opinion evidence it was not justified in ignoring the evidence of "going value" or of merely attaching some inappreciable importance to it. See *Bonbright v. Geary* (D. C.) 210 Fed. 44, 54, 56. The first question certified must be answered in the affirmative.

Upon the next two questions we disagree with the learned Appellate Division.

In determining the cost of reproduction the commission allowed \$12,717 as the costs of restoring the pavement as it existed when the mains and service pipes were laid in the streets. The relator claimed an allowance of at least \$200,000 for the cost of restoring pavements subsequently laid on the theory that that cost would have to be incurred if the mains were to be laid to-day. But the new pavements in fact added nothing to the property of the relator. Its mains were as serviceable and intrinsically as valuable before as after the new pavements were laid. The controlling consideration under the preceding point also determine this. The rights of the public are not to be ignored. The question has a double aspect. What will be fair to the public as well as to the relator? *Smyth v. Ames*, *supra*. Should the public pay more for gas simply because improved pavements have been laid at public expense? It is no answer to say that the new expensive pavements suggest improved conditions which, though adding to the value of the plant, will not, by reason of the greater consumption, add to the expense per thousand feet of the gas consumed. The public are entitled to the benefit of the improved conditions, if thereby the relator is enabled to supply gas at a less rate. The relator is entitled to a fair return on its investment, not on improvements made at public expense. It is said that the mains will have to be relaid. So will the new pavements, and much oftener. Both might possibly be relaid at the same time. The case is not at all parallel to the so-called unearned increment of

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land. That the company owns. It does not own the pavements, and the laying of them does not add to its investment or increase the cost to it of producing gas. The cost of reproduction, less accrued depreciation, rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience, and must be applied with reason. On the one hand, it should not be so applied as to deprive the corporation of a fair return at all times on the reasonable, proper, and necessary investment made by it to serve the public, and on the other hand it should not be so applied as to give the corporation a return on improvements made at public expense which in no way increase the cost to it of performing that service.

The Appellate Division felt bound by the decision of the United States Circuit Court in the Consolidated Gas Case, 157 Fed. 49, and it is true that such an allowance was made in that case. But the United States Supreme Court held in that case (212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 15 Ann. Cas. 1034) that the rate established was not confiscatory, and did not pass on the propriety of that allowance. What was said in the opinion on the subject of present value was merely a general statement having no necessary relation to the question now under consideration.

We agree with the Appellate Division that annual increase in the value of land is not income. Of course, under the rule of the Ames Case, *supra*, land might become so valuable as to require its use for other purposes and as to make a rate based on it unfair to the public. The present is not such a case.

The first question should be answered in the affirmative, the second, third, and fourth in the negative, and the order of the Appellate Division, in so far as it remits the proceedings to the public service commission, should be affirmed, without costs.

**WILLARD BARTLETT, C. J., and WERNER, HIS-
COCK, CHASE, COLLIN, AND CUDDEBACK, JJ., concur.**

Order affirmed, etc.

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(Court of Appeals, October, 1913.)

**SPRINGS, Appellant, v. HANOVER NATIONAL
BANK, Respondent.**

(209 N. Y. 224, 103 N. E. 156. Aff'g 152 App. Div. 949, 137 N. Y. Supp. 1144.)

1. Bills and notes — Draft — Right to recover back moneys paid.

The drawee of a draft who has paid the same to a bona fide holder for value relying in part upon purported bills of lading attached by the drawer of the draft, but not mentioned therein, cannot, on dis-

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a. *In general*, 370.

b. *Payments made on forged instruments*, 377.

1. *Where indorser's name was forged*, 381.

2. *Where amount payable by instrument was raised*, 384.

c. *Necessity of returning or offering to return instrument*, 388.

d. *Necessity for demand*, 389.

a. *In general.*

In absence of trust or agency the rule is that it is only to the extent of the interest remaining in the party committing the fraud that money can be followed as against an innocent party having a lawful title founded upon consideration; and that if it has been paid in the ordinary course of business, either upon a new consideration or for an existing debt, the right of the party to follow the money is gone.

Justh v. The National Bank of the Commonwealth, 56 N. Y. 478.

Brown v. Williams (4 Wend. 360) was an action of assumpsit for money had and received. The plaintiff was the second endorser on a note. As the result of a suit instituted by the defendant, who was the holder of the note, the plaintiff paid the note as such endorser. The defendant having released the payee from liability on the note, the plaintiff brought suit

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covery that the bills of lading are forgeries, recover back the moneys so paid from the payee or indorsee who has neither guaranteed the genuineness of said instruments nor been aware of their fraudulent character, as the mere attachment of bills of lading to a draft does not make the former a part of the latter, and one who accepts or pays such a draft must be assumed in the absence of special circumstances to do so on the faith of the draft itself.

2. Bills and notes — Draft — Attached bills of lading.

A draft, because it has the word "cotton" printed thereon, has no such reference to bills of lading attached thereto as to imply that the draft was conditional or drawn against such purported shipments of cotton.

Appeal from a judgment of the Appellate Division, First Department.

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to recover the money paid, as the release of the payee who was a prior endorser discharged the plaintiff as subsequent endorser.

The defendant in *Southwick v. First National Bank of Memphis* (84 N. Y. 420), received for deposit a draft and credited it to the account of the drawer to whose order it was payable. It was understood between the drawer and the defendant that the draft would be credited to the drawer's account which was overdrawn in excess of the amount of the draft. However as between the drawer and the drawee it was understood that the draft was to take up an old draft. When the defendant presented the draft to the drawee it was paid. The plaintiff as assignee of the drawee brought suit to recover on the ground of mistake. The court in holding that no recovery could be had said: "It is certainly true that if the drawees had known what they now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the old draft, they would not have accepted or paid the draft. But were they so mistaken that they can reclaim the money voluntarily paid by them? It is not every mistake that will lay the ground work for relief. It must be a mistake as to some existing fact, not as to something to happen or to be done in the future. It must be a mistake as to some fact not remotely, but directly, bearing upon the act against which relief is sought. If it were the rule to relieve against mistakes as to remote or what are sometimes called extrinsic facts, great uncertainty and confusion would attend business transactions. Here the draft was genuine, addressed to the drawees, who had authorized it to be drawn, and it was held by the defendant, which could lawfully receive payment thereof. There was

Action by Richard A. Springs and others against the Hanover National Bank of New York City to recover back moneys paid on a draft as drawee.

John R. Abney, of New York City, for plaintiff-appellants.

Charles F. Brown and *Percy S. Dudley*, both of New York City, for defendant-respondent.

HISCOCK, J. The plaintiffs are, and for some time have been, engaged as cotton commission merchants in the business of buying and selling cotton in New York, dealing mainly on the Cotton Exchange. The defendant at all times involved in this action has been a national bank, having its banking offices in said city, and the First National Bank of Decatur,

Recovery of payments made on negotiable instruments.—Continued.

no mistake as to the intrinsic facts. The fact that the drawers had not acted in good faith with the drawees, or had placed the draft and its proceeds beyond their control, so that the old draft might not be paid was not too remote. The mistake of the drawees was rather as to the application of the money paid by them—a future fact. If the defendant had received this money and applied it upon the old draft the precise expectation of the drawees would have been met and there would have been no ground of complaint. It is believed that no case can be found which holds that a party paying money, under the circumstances existing here, has been allowed to reclaim it upon the ground of mistake.”

In *Justh v. The National Bank of the Commonwealth* (56 N. Y. 478), one Gray borrowed plaintiffs' checks for \$40,000 upon forged collaterals. He took the checks and had them certified to be good by the drawee bank, and then deposited them with the defendant, which received the money upon them. Plaintiffs brought suit to recover the amount of the checks from the defendant bank which had received the money on Gray's deposit. Judge Earl in *Southwick v. First National Bank of Memphis* (84 N. Y. 420), in commenting on this case said: “In that case the plaintiffs clearly parted with their checks under a mistake as to the genuineness of the collaterals. If they had known that they were forgeries they would not have parted with the checks. But upon the assumption that the defendant, had parted with no value for the checks, or upon the faith of the

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Ala., was a similar banking association having its banking office at said latter city, and Knight, Yancey & Co. was a firm of cotton dealers carrying on business as such at said last-named city and other places until they went into bankruptcy in April, 1910. Said latter copartnership had done business with said First National Bank of Decatur for several years, procuring the discount of drafts with and without bills of lading attached for large sums of money, and also had done business with plaintiffs, mainly dealing in futures. Said copartnership at the time of the occurrences involved in this action was in good standing and credit, and in my opinion there was no evidence introduced or offered which tended to impeach such standing with either of the banks which have been mentioned.

On March 29, 1910, telegrams and a letter passed between said copartnership and plaintiffs, whereby in substance the

Recovery of payments made on negotiable instruments.—Continued.

checks, this court held that the plaintiffs could not recover the amount of the checks, treating them as money paid to the defendant. The decision was also put upon the ground that the defendant had parted with value for the checks, and thus rests upon both grounds."

In *Franklin Bank v. Raymond* (3 Wend. 69), a note was transferred to the plaintiff by the payee without endorsement. The assignment was made however before maturity and for a valuable consideration. The defendants (the makers) paid the plaintiff and took the note whereupon they discovered that it had not been endorsed and was therefor the subject of a set off in the nature of a demand which they had against the payee. The court, in holding that the money could not be recovered back, said: "The general principal of law is indisputable, that if a party pays money under a mistake of the real facts, without any negligence imputable to him for not knowing them, he may recover back such money. What sort of facts are meant? Such facts, I apprehend, as show that the demand on which the money was paid did not actually exist against the person paying at the time the money was paid. * * * The case before us is not only different, but so essentially different as to exclude, in my opinion, the application of the principle which permits money paid in ignorance of facts to be recovered back. The debt paid by the defendants was one that subsisted against them at the time of payment. The fact of which they were ignorant, did not show that there was no debt existing at the time, it only showed that they were in a situation which enabled

latter authorized the former to draw upon them for \$39,000 as against a shipment of 600 bales of cotton. In accordance with such arrangement, on said date said firm presented to the Decatur bank their draft for \$39,000 drawn on plaintiffs payable at sight with what purported to be bills of lading and certificates of insurance for 600 bales of cotton attached, and this draft was by said Decatur bank duly discounted and the proceeds thereof placed to the credit of said firm, who on the same day checked the same out.

On the same day the Decatur bank transferred said draft by unrestricted indorsement to the defendant and mailed it in a letter which stated that it was "for collection and credit." The draft thus inclosed reached the defendant shortly thereafter and was presented with the bills of lading attached in the usual manner to plaintiffs, who, after satisfactory examination, took

Recovery of payments made on negotiable instruments.—Continued.

them to set off against the demand they had paid, a demand due from them to Bailey. I do not find any case where money paid on a subsisting demand has been recovered back on the ground that the person making the payment has subsequently discovered facts that show he has a set off against the demand."

The drawees of a negotiable draft, drawn by persons who claim to have made a shipment to the drawee, cannot recover back the moneys paid to a holder in due course on discovering that the goods were never shipped to them.

Waddell v. Hanover National Bank, 48 Misc. 578, 97 N. Y. Supp. 305.

Mt. Morris Bank v. Twenty-Third Ward Bank (172 N. Y. 244, 64 N. E. 810), was an action brought to recover money paid on a promissory note payable at the plaintiff's bank. When the note became due, at the request of the defendant, it was certified by the plaintiff. The certification was made through a mistake as to the condition of the maker's account. The mistake was discovered on the same day and the defendant was notified and requested to erase the certification. The right of no party was affected by the certification. Each bank clerk through another bank which was a member of the clearing house, and were both bound by the clearing house rules. Notwithstanding the notice the defendant deposited the note in its clearing bank, and the same was paid through the clearing house. On the same day the plaintiff tendered a return

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it up and gave the defendant a check for its amount. The moneys thus received by defendant from plaintiffs were placed to the credit of the Decatur bank, and, as claimed by defendant, were withdrawn by the latter in the ordinary course of business April 4, 1910.

It subsequently transpired that the purported bills of lading were forgeries and did not represent any shipment of cotton. These forgeries, however, are not claimed to have been of such a character as to be obvious, and neither the Decatur bank nor the defendant had any notice or knowledge that they were such until notice was received by the defendant from the plaintiffs on May 13, 1910, accompanied by a demand for repayment of the amount of said draft on the ground that the bills of lading were forgeries.

Except for the word "cotton," lithographed in the body of

Recovery of payments made on negotiable instruments.—Continued.

of the note and demanded repayment which was refused. It was provided by the clearing house constitution that all cases of bad checks, drafts and notes were to be adjusted directly between the bank that deposited them and the bank on which they were drawn. It was further provided that upon the return of the check, draft or note to the bank from whom received, the said bank shall immediately refund the amount received through the clearing house. Later a rule was adopted providing for a report to the clearing house manager in case of a bank's refusal to refund; and making it the manager's duty to readjust the clearing house statement so as to take care of such refund. The court held that this last provision did not repeal the former, so that the plaintiff could recover direct from the defendant without apply to the manager for a statement of the accounts.

In *Lake v. Artisans' Bank* (3 Keyes, 276, 3 Abb. Dec. 10), an endorser paid the amount of a note to the holder. The payment was made under a mistaken belief, based upon statements made by the holder to the effect that the endorser, or a prior one, had been duty charged. On discovering that he was not so charged, the endorser brought an action to recover back the amount paid. The court held that he could recover.

Where a bank, which has received a check for deposit, delays in presenting the same for payment, and the bank on which it is drawn in the meantime fails, the depositor, having paid the check as endorser after the bank's

the blank form of draft, there is nothing in the latter which is even claimed to make any reference to the bills of lading which were attached to it. There is evidence from which it may be inferred that plaintiffs in taking up the draft from defendant were more or less influenced by the supposed security of said bills of lading. There was also introduced and offered by plaintiffs some evidence claimed to permit the inference that the Decatur bank had other security from Knight, Yancey & Co., and that, relying on such security, it was too trustful in its dealings with said firm in such transactions as the one here involved, and did not sufficiently scrutinize the purported bills of lading. There is, however, not even a suggestion which questions the good faith of the defendant if it be regarded, as plaintiffs elect to regard it, as the purchaser and owner of the draft in question instead of a collecting agent for the Decatur bank.

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failure, is entitled to recover back the money from the bank on proof that the check would have been paid if it had been presented in due time, and that he was ignorant of this fact when he paid his bank as endorser. *Martin v. Home Bank* (160 N. Y. 190, 54 N. E. 717.) The court in its opinion said: "The defendant, on receiving the check, assumed the obligation to present it for payment within a reasonable time, and had his obligation been discharged, the check would have been paid and no one would have sustained any loss from the transaction. That the defendant neglected or failed to perform this duty is a fact in the case that is not now seriously questioned. The legal effect of the defendant's omission in this respect was to discharge the indorser and the drawer as well, since the latter had provided funds to meet the checks which were lost by the failure of the bankers upon which it was drawn. When the indorser paid the check without knowledge of the facts, the defendant received so much money from him to which it was not legally entitled. The plaintiff's testator, having paid the check without knowledge of the facts which discharged him from all liability as indorser, he was entitled to call upon the defendant to restore the money so paid."

Iselin v. Commercial National Bank (6 App. Div. 532, 40 N. Y. Supp. 390), was an action brought by the drawees in a draft to recover back money paid to the holder of the draft on the ground that since paying the

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This case directly presents to this court for the first time the question whether the drawee of a draft who has paid the same to a bona fide holder for value relying in part upon purported bills of lading attached by the drawer to the draft, but not mentioned therein, can, on discovery that the bills of lading are forgeries, recover back the moneys so paid from the payee or indorsee who has neither guaranteed the genuineness of said instruments nor been aware of their fraudulent character.

In this case the plaintiffs, who as such drawees paid the defendant as indorsee from another bank a draft for \$39,000 drawn by a firm of cotton dealers in the south with forged bills of lading attached, urge four theories as justifying a recovery back. They say that defendant represented that the bills of lading were genuine and truthful both as to signatures and contents; that the draft contained such reference to the bills of lading as to make it conditional on the genuineness of the bills

Recovery of payments made on negotiable instruments.—Continued.

draft they have learned that it was procured by fraud. The court held that they must not only show the fraud, but must also negative the facts or inferences which would give the holder of the draft to whom they have paid it the right to hold the money. To quote: "Having voluntarily paid the note, the plaintiffs come into court, and ask that the money paid may be recovered back, on the ground that, because of facts which they have since discovered, they were not liable to pay the instrument. To sustain that cause of action they must allege and prove that the defendant had no right to collect the instrument from them, and to allege and prove that they must show that the holder of the note was not a bona fide purchaser for value before maturity.

b. Payments made on forged instruments.

The drawee of a bill is held bound to know the hand-writing or the drawer; and if he accepts or pays a bill in the hands of a bona fide holder for value, he is concluded by the act and cannot recover the money back, although the bill turns out to be a forgery.

Goddard v. Merchants' Bank, 4 N. Y. 147.

Salt Springs Bank v. Syracuse Savings Institution, 62 Barb. 101.

National Park Bank v. Ninth National Bank, 46 N. Y. 77.

In National Park Bank v. Ninth National Bank (supra), the court

of lading; that plaintiffs relied on an examination of signatures by the bank and its transferrer which had not in fact been made, and therefore the payment was made under a mistake of fact; that the defendant or its transferrer departed from the usual course of business in discounting the draft, and thereby caused a mistake of fact; and that even if both parties were equally innocent the defendant must suffer.

These theories are not sustained. For instance, while it may be assumed that a draft like the present one may make such reference to bills of lading attached thereto as to make it conditional on their genuineness and to permit a drawee who has paid the draft to recover back his moneys if the bills of lading prove to be forged, there is no evidence to bring this draft within that principle. Plaintiffs' entire argument at this point is built upon the fact that there was lithographed or printed in the blank form or draft used on this occasion the

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said: "For more than a century it has been held and decided, without question, that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid."

The plaintiff in *Goddard v. Merchants' Bank* (4 N. Y. 147), brought suit to recover back the amount of a draft paid by him for the honor of the drawers, after payment was refused but before protest, because, after payment, he discovered it to be a forgery. The draft was paid to the agent of the holder upon the representation that it was a genuine draft. After giving immediate notice of the forgery, and before the agent had paid the money over to his principal the suit against the agent was brought, and the court held that the plaintiff could recover.

The defendant in *Salt Springs Bank v. Syracuse Savings Institute* (62 Barb. 101), received, in the course of its business, a forged check, upon the plaintiff bank, which it paid without notice of such forgery. Upon presentation the plaintiff paid the amount thereof to the defendant, and upon discovering the forgery brought suit to recover back the money paid to the defendant. The court held that no recovery could be had.

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word "cotton." This was evidently for some such general purpose as that of advertising or characterizing the business in which the drawers were engaged, and it cannot be seriously argued that it had any such reference to the purported bills of lading which were attached to this particular draft as to imply that the latter was conditional or drawn against such purported shipments of cotton. One of the other theories outlined is based on certain evidence introduced or offered from which plaintiffs contend that it may be inferred that the bank in Decatur, Ala., from which defendant received the draft, was not as careful in watching the drawers of the draft or in scrutinizing the bills of lading as it should have been and hence helped to bring about plaintiffs' misfortune.

We think there was no evidence which showed legal fault upon the part of the Decatur bank in originally discounting the draft, and certainly there is no evidence which affects the

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In *The Bank of Commerce v. The Union Bank* (3 N. Y. 230), the forgery was not in counterfeiting the name of the drawer, but in altering the body of the bill. The forgery was committed by altering the date, number, amount and payee's name. The bill was paid by the drawee by mistake and without knowledge of, or reason to suspect the fraudulent alterations. The court held that the money could be recovered back.

The plaintiff in *Gombossy v. Katz* (18 Misc. 359, 41 N. Y. Supp. 411), executed and delivered four notes to the defendant. Thereafter, on payment of the amount due on the notes, he received from the defendant what purported to be the notes executed by him. They were in fact forged, the original notes having been transferred to a bona fide holder for value. The court in holding that the plaintiff could recover back the amount paid said: "The plaintiff's action is to recover money paid under mistake. Money paid under mistake of fact may be recovered, however negligent the party may have been in making the mistake, unless the payment has caused a change in the position of the other party that would be unjust to require him to refund. Payments on forged paper are based upon the ground of being made by mistake, and the party may recover back the amount. * * * This defendant is the alleged fraudulent utterer of the forged paper, and is called upon to answer, denying this allegation of

defendant in that respect. The contention of the plaintiffs is that defendant became the owner and holder of the draft and was not a mere collecting agent for the Decatur bank. Accepting this theory, there is no question that defendant became the owner and holder of the draft in the regular course of business for value and without notice of any fact or circumstance which made it chargeable with knowledge or of responsibility for the forgery of the bills of lading.

Therefore in the end plaintiffs confront the general question as first stated.

While, as I have said, this question has not been directly decided by this court, it has been a subject of discussion and decision in many other courts.

In these cases the argument had been made on which plaintiffs in this case must finally rely, that a party accepting or discounting drafts accompanied by purported bills of lading

Recovery of payments made on negotiable instruments.—Continued.

forgery, or fully explaining the illegality of his alleged transactions in the matter."

In case of commercial paper being paid without previous inspection, it is, no doubt, the duty of the party paying to use due diligence in making the inspection as soon as he has the opportunity, and in giving notice of the forgery if one be discovered; and if by his failure to do so the party receiving is prejudiced, such negligence would be a good answer to the claim for restitution.

Allen v. Fourth National Bank, 59 N. Y. 12.

In *Lewis v. White's Bank of Buffalo* (27 Hun, 396), the plaintiff paid a note purporting to be signed by himself after he had inspected the same. The court in holding that he could not recover back the money paid on discovering that it was a forgery said: "We are of opinion that the case was correctly disposed of. Notwithstanding the general rule that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, it is well settled that where the alleged mistake consists in the recognition as genuine of a forged signature, either of the party paying or of his correspondent, whose signa-

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upon the faith and security of which he more or less relies and which prove to be forgeries has acted under a material mistake of fact which entitles him to be relieved from his acceptance of payment. To this argument, however, the answer in substance has been made by the courts with almost unvarying uniformity, that the mere attachment of bills of lading to a draft does not make the former a part of the latter; that one who accepts or pays such a draft must be assumed in the absence of special circumstances to do so on the faith of the draft itself, and that reliance upon the bills of lading is not a fact which enters into the substance of the real transaction in accepting or paying the draft, but is an extrinsic fact; that, if the rule were established that relief should be afforded against the acceptance or payment of a draft because of mistaken belief in the genuineness of attached bills of lading, such rule logically would apply to other

Recovery of payments made on negotiable instruments.—Continued.

ture he was held bound to know, an action to recover back the money paid will not lie. * * * In the present case the plaintiff deliberately inspected his signature to the note before paying, and whatsoever doubts he may have expressed as to its genuineness at the time of inspection, his subsequent payment was such a recognition of the genuineness of the signature as prevents a recovery."

1. *Where indorser's name was forged.*

One of the depositors of the plaintiff in Corn Exchange Bank v. Nassau Bank (91 N. Y. 74), drew a check upon the bank which paid it upon presentation the following day. It was paid to the defendant, who had received it from a depositor in the regular course of business, and charged to the drawer's account. More than a year thereafter the depositor noticed the plaintiff that the indorsement by the payees was forged, and brought suit to recover the moneys withheld on account of said check. The defendant was given notice of the suit. After paying the judgment therein the plaintiff demanded repayment of the amount so paid, which was refused. Thereupon the above action was commenced. It was shown by the defendant that the account of its depositor continued good for the amount of the check up to the date when the plaintiff was notified that the indorsement was forged; that no steps were taken in the meantime by either the plaintiff or the drawer of the check, and when the forgery

cases, as that the drawee had entertained a mistaken notion as to the financial standing and responsibility of the drawers or as to the value of security for the draft and thus lead to an instability and confusion in transactions involving negotiable paper which would be intolerable; that as between the innocent holder for value of a draft and the drawee who has accepted or paid the same in reliance upon forged bills of lading there is no reason why the drawee should be permitted to shift the burden of loss to the holder.

While, as stated, none of these decisions are by this court, and therefore controlling, nevertheless they have such weight and have so widely established a rule of negotiable paper that we should feel reluctant to disagree with them even if we doubted the wisdom of the principles upon which they are based. We do not, however, have any such difference with other courts in respect of the principles which are involved, and have no

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was discovered the defendant could not recover from its depositor because of his insolvency. The court held that plaintiff could recover in his action as its duty of examination was no greater than that of the defendant.

Canal Bank v. Bank of Albany (1 Hill, 287), was an action in assumpsit to recover money paid on a draft. Plaintiff paid the amount thereof to the defendant bank which came into possession of the same after several endorsements. The payee's name was the first endorsed thereon. It however was a forgery and, after so notifying the defendant, plaintiff brought the above suit. The court held that although the defendant was innocent it was nevertheless liable to repay the money to the plaintiff.

Plaintiff in Coggill v. American Exchange Bank (1 N. Y. 113), sued in assumpsit to recover back the money which he, as drawee had paid to the defendant as the holders of a bill of exchange, upon which the name of the payee had been forged. It was a partnership bill and the partner who drew it forged the name of the payee and had it discounted by a bank other than the defendant, which bank transferred it to the defendant for collection. After plaintiff had paid the defendant he discovered the forged endorsement. It was held that an action to recover back the money so paid could not be maintained. In distinguishing this case from the case of Canal Bank v. Bank of Albany, supra, the court said: "It did

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hesitation in adopting the rule which has been established by them.

It is impossible within reasonable length to review even the leading cases on this subject, and reference will be made to the opinions in only two or three of them.

Hoffman & Co. v. Bank of Milwaukee, 79 U. S. (12 Wall.) 181, at page 189 (20 L. ed. 366), was an action brought by plaintiffs as drawees to recover the amount of three drafts paid by them to the defendant on the ground that such moneys were paid under a mistake of fact. The fundamental and decisive fact on which they based their claim to recovery was that said drafts were accompanied by bills of lading on the faith of which they made payment supposing them to be genuine, when as a matter of fact they were forged. The defendant had discounted the drafts for value and was ignorant of the fraudulent character of the bills of lading. There was evidence, as in this case,

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expressly appear in that case, that Bently, the payee named in the draft, was the owner of it. In the case now before us, the fact is fully established, that Billings, the payee named in the bill, never was the owner of it; nor was it drawn with the intent that he should either endorse it, or have any interest in, or concern with it. In the one case, the payee owned the bill, and could have maintained action upon it, both against acceptors and the drawers, while in the other, the payee has no interest in the bill, and cannot maintain an action upon it, for his own benefit against any one. In the one case, payment to the holder of the bill would be no protection against an action by the payee, because he was the true owner; while in the other, the payee having no title, could in no event have a legal claim to the money."

The plaintiff in *Holt v. Ross* (54 N. Y. 472), was the drawee in a draft, which was stolen from the post-office, and the payee's endorsement forged thereon. The plaintiff paid it to the defendant express company which had it for collection as agent. The agency however was not disclosed to the plaintiff. The court held that the plaintiff, on discovering the forgery, could sue to recover back the money paid.

In *Egner v. Corn Exchange Bank* (42 Misc. 552, 86 N. Y. Supp. 107), an agent of an insurance company caused a check to be issued by the company

of prior dealings between the drawers and drawees and of communications between them with reference to the drawing of the drafts in question. The Supreme Court affirmed the action of the lower courts in directing judgment for the defendant, and in so doing wrote as follows: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration; but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange, to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the

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in payment of a supposed loss, forged the endorsement of the beneficiary-payee, and procured the same to be cashed by the plaintiff who, after endorsement, deposited it with the defendant bank which received payment thereon from the bank on which it was drawn. The check was charged against the account of and returned to the insurance company as a voucher. On discovering the forgery the company returned the check to its bank, and this bank returned it to the defendant bank which demanded payment of the plaintiff. Plaintiff returned the amount of the check to the defendant and then brought suit, alleging payment thereof under a mistake of fact. The court held that plaintiff could not recover.

2. Where amount payable by instrument was raised.

In *The Bank of Commerce v. The Union Bank* (3 N. Y. 230), the forgery was not in counterfeiting the name of the drawer, but in altering the body of the bill. The forgery was committed by altering the date, number, amount and payee's name. The bill was paid by the drawee by mistake and without knowledge of, or reason to suspect the fraudulent alterations. The court held that the money could be recovered back.

A check was changed both as to amount and name of payee in *The National City Bank of Brooklyn v. Westcott* (118 N. Y. 468, 23 N. E.

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holder of the instrument. * * * Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived, that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except

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900). The check was delivered to the N. Y. & B. D. Express company for collection after being endorsed in blank with the name of the payee as changed. The express company likewise endorsed the check for collection and delivered it to the defendant express company. On presentation the check as raised was paid to the defendant company and by them to the N. Y. & B. D. Express company, which company in turn paid it to the person for whom it was acting. On discovering that the check had been changed the over-payment was sued for. The court however held that the action could not be maintained, as the endorsement showed that the defendant company was simply acting as agent, and further the defendant had in good faith paid over the money to the company from which it received the check. "The payment was made by the plaintiff upon a mistake of fact as to the character of the check; and money paid under such circumstances may be recovered back from the party to whom payment is made. If the Westcott Express company had been or had assumed to be the apparent owner of the check when it was presented to and paid by the plaintiff, the defendant would have been liable to reimburse the plaintiff. * * * But in the present case the check was in fact sent to the defendant company for collection, of which the plaintiff was advised by the indorsement upon it to that effect made by the N. Y. & B. D. Express Co. The defendant, therefore, apparently and in fact represented that company, and in the relation of such agency received the money

the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction. On the contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described. Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security

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from the plaintiff. * * * And prior to the time of the discovery of the fraudulent character of the check, having handed the money over to the company from which it was so received for collection, the defendant was not liable to the plaintiff as for money paid by mistake."

In *White v. Continental National Bank* (64 N. Y. 316), a bill was deposited with the defendant bank, which presented it to the plaintiffs upon whom it was drawn, and it was thereupon paid. About six months later it was discovered that the amount had been raised, whereupon the above suit to recover back the money paid was commenced. The court, in sustaining the plaintiffs' right of recovery, said: "The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument,

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accompanying the bills of exchange. * * * Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defense to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument. * * * Forgery of the bills of lading would be a good defense to an action on the bills if the defendants in this case had been the drawers, but they were payees and holders for value in the regular course of business, and the case last referred to, which was decided in the Exchequer Chamber, shows that such an acceptance binds the acceptor conclusively as between them and every bona fide holder for value."

Goetz v. Bank of Kansas City, 119 U. S. 551, at page 555,

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and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery, which invalidated the bill and its title to the moneys represented by it. It follows that there could be no negligence on the part of the plaintiffs which could defeat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation, there was no estoppel to bar the action."

In *National Bank of Commerce v. National Mechanics' Banking Assn.* (55 N. Y. 211), the plaintiff certified a check for \$56 which was subsequently raised to \$15,006. Thereafter the bank paid it through the clearing house, as raised. The court held that the money could be recovered back unless the defendant has been misled and prejudiced by the mistake. In its opinion the court said: "If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as for instance if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then clearly, to the extent of the loss thus sustained, the plaintiff should be responsible. But it appears that all the money which Greenleaf, the fraudulent depositor, obtained from the Mechanics' Banking Association, on the credit of the altered check, was paid out on the

7 Sup. Ct. 318, 320 (30 L. ed. 515), was an action brought to recover on a bill of exchange with forged bills of lading which had been discounted by the bank and accepted without knowledge of the fraud in either party. The contention of the defendant was that he had accepted the draft in question in the belief that the bills of lading were genuine, whereas they were forged; that genuineness was asserted by the indorsement of the bank on certain invoices accompanying them; that the drawer bore such a reputation for dishonesty in the community that the

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sixteenth of February, the day before the check was presented to the plaintiff. On the sixteenth, Greenleaf drew out of the Mechanics' Banking Association a larger amount of money than that for which it had given him credit on the faith of the altered check, and he drew none afterward. The recognition of the check by the plaintiff, on the seventeenth of February, could not have had any influence upon the action of the Mechanics' Banking Association in paying Greenleaf's drafts on the sixteenth. The loss occasioned by those payments had been fully incurred by the Mechanics' Banking Association before the plaintiff had made the mistake which it seeks in this action to have corrected. Such being the case, there is no equity in the claim of the Mechanics' Banking Association to retain the money which it obtained from the plaintiff through mistake, and thus to shift the loss which it had sustained, through the fraud of its own customer, from itself to the plaintiff."

c. Necessity of returning or offering to return instrument.

Where a bank, which has received a check for deposit, delays in presenting the same for payment, and the bank on which it is drawn in the meantime fails, the depositor, having paid the check as endorser after the bank's failure, is entitled to recover back the money from the bank on proof that the check would have been paid if it had been presented in due time, and that he was ignorant of this fact when he paid his bank as endorser; and it is not necessary that he should return or offer to return the check as it would be without value. *Martin v. Home Bank* (160 N. Y. 190, 54 N. E. 717). As to the necessity for returning the check the court said: "The other point urged in support of the appeal is that the plaintiff should have returned or tendered to the defendant the check before he could recover the money paid upon it, and that in any event the defendant was not liable for the money until after a demand made. * * *

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banks were guilty of culpable negligence amounting to bad faith in discounting the drafts on the faith of the bills of lading without inquiring as to their genuineness. The court, in overruling these claims and holding the acceptor liable, wrote as follows: "A bank in discounting commercial paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn, as in the present case, are merely security for the payment of the drafts. * * * The bank, after discounting the drafts, stood to-

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These objections may, however, be very satisfactorily answered on their merits. It is quite true that when a party begins an action to rescind a contract, or a transaction, he must first restore what he has received under it but if the thing received is of no value, he is not bound to return it, since the law will not insist upon the performance of an idle ceremony. * * * The check in question was not of the slightest value in the hands of anyone. It was not good against the drawer, since he had provided the funds to meet it, which were lost by the neglect of the defendant to present it for payment in time. It was not good against any of the indorsers, since they were discharged by the defendant's delay in presenting it. It was not good against the drawees, the Chicago banking firm, since they were not parties to it, not having accepted or certified it. Thus it will be seen that every one who was a party to the paper was discharged from all liability upon it in consequence of the defendant's failure to present it, and hence the possession of the dishonored check could be of no benefit to the defendant or anyone else. The money which the drawer had placed in the bank to meet the check passed upon the failure of the bankers to their assignee for the benefit of creditors generally. It is suggested that had the check been returned to the defendant it might, as the holder thereof, be entitled to share in the assets of the insolvent bankers in Chicago when distribution is made by the assignee. But the right to share in this distribution does not depend upon the possession of the check, but upon facts outside of it which may confer an equitable right upon the defendant to the dividend."

d. Necessity for demand.

In *Martin v. Home Bank*, supra, the court held that it was not necessary to make a demand on the defendant before bringing suit to recover back money paid under mistake.

wards the acceptors in the position of an original lender, and could not be affected in its claim by the want of a consideration from the drawer for the acceptance, or by the failure of such consideration." It also interpreted the opinion in the Hoffman Case as deciding as follows: "Supposing the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached, that fact would not benefit them, as the bills of exchange were in the usual form, and contained no reference whatever to the bills of lading, and it was not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, or that they had made any representation upon the subject to induce the plaintiffs to contract any such liability; that undoubtedly the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to them, but that they were not a part of those instruments, and could not be regarded in any more favorable light than as collateral security accompanying the bills of exchange; and that proof that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business."

In *First National Bank of Detroit v. Burkham*, 32 Mich. 328, the court discussed a situation where the drawees sought to recover from the payees the amount of a draft which they had paid, and the genuineness of which was not disputed, upon the ground that the security for the bill was fictitious when they supposed it to be genuine, and that therefore they had made payment under a mistake of fact. Judge Cooley, writing in behalf of the court, said: "Admitting this to be so, how does the fact concern the payees? Do they assume to guarantee the fairness of the dealings of the drawers with the drawees, or the adequacy of any securities upon which the dealings are based? Not, certainly, in ordinary cases. The law merchant gives the payees the right to assume that any draft they receive and forward, if it is accepted and paid, is a draft which, from the state of the dealings between the drawers and the drawees, it is right

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and proper that the latter should pay as the principal party; and the presumption of law that such is the case is their complete protection if they received the bill in the ordinary course of business and for value. What is peculiar in the present case is that the security which was sent forward with the bill proved to be fictitious. It is said that the drawees relied upon this security, and would not have paid the bill but for a belief that it was valid. It is in this that the mistake consists on which they rely for a recovery. If a mistake regarding their security will authorize the drawees to recall the payment made to the payee, no reason is perceived why a mistake regarding the responsibility of the drawer, or regarding his honesty or integrity, or anything else upon which they relied for protection in their dealings, should not justify the like action. If they suppose the drawer to be responsible when he is not, is not this as genuine a mistake of fact on their part as if they suppose a security to be good when it is fictitious? * * * But we think it would be an exceedingly unsafe doctrine in commercial law, that one who had discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. * * * The best view that can be taken of this case for the plaintiffs below is that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank?"

The principles affirmed by these decisions are supported directly or indirectly by the following cases: *Robinson v. Reynolds*, 2 Q. B. (*Adolphus & Ellis N. S.*) 196; *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. 4; *Leather v. Simpson*, L. R. (11 Eq.) 398; *Young v. Lehman*, 63 Ala. 519; *Craig v. Sibbett*, 15 Pa. 238; *Alton v. First Nat. Bank of Webster*, 157 Mass. 341, 32 N. E. 228, 18 L.R.A. 144, 34 Am. St. Rep. 285; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 420; *Guaranty Trust Co. v. Grotrian*, 114 Fed. 433, 52 C. C. A.

235, 57 L.R.A. 689; Hannay v. Guaranty Trust Co. (C. C.) 187 Fed. 686; 2 Daniel's Negotiable Instruments, § 1734D.

It would likewise be impossible within reasonable limits to review the many cases cited by the learned counsel for the plaintiffs as authority for his contention that they are entitled to recover. Most of them are clearly distinguishable from and not at all contradictory of the cases which have been cited in support of the conclusions reached by us.

It is true that two or three decisions were made by an inferior court of Texas and by the courts of North Carolina, Mississippi, and Alabama, which are at variance with those cases and which do tend to support the plaintiffs' position. These decisions, however, were reversed or so qualified by the courts of the same states respectively that they are not entitled to serious consideration.

We therefore hold that the judgment appealed from should be affirmed, with costs, upon the grounds stated, and find it unnecessary to discuss the arguments which have been addressed to us on other points.

CULLEN, C. J., and GRAY, WERNER, COLLIN, CUD-
DEBACK, and MILLER, JJ., concur.

Judgment affirmed.

1913] **Demos v. New York Evening Journal Pub. Co.**

(*Court of Appeals, December, 1913.*)

**DEMOS, Respondent, v. NEW YORK EVENING
JOURNAL PUB. CO., Appellant.**

(210 N. Y. 13, 103 N. E. 771. *Rev'g* 146 App. Div. 947, 131 N. Y. Supp. 418.)

1. Libel and slander — Whether publication is defamatory — As question for jury.

In an action for libel it is for the jury to determine in a case of doubtful meaning, whether the tenor and import of the publication are offensive and defamatory, and whether it could be so understood by the general public, or in the plaintiff's neighborhood.

2. Libel and slander — Whether publication is defamatory — As question for jury.

Where a published article relating to the possible culpability of two men who were held upon suspicion of being concerned in a homicide, recites that a certain witness, naming him, was brought before the

***Note.* — Whether publication is defamatory as question for jury.**

- a. *In general*, 393.
- b. *Article imputing unchastity*, 398.
- c. *Article imputing crime*, 401.
- d. *Article in criticism of public officer*, 403.

a. *In general.*

Where words are not libelous as a matter of law it is for the jury to determine in what sense they were uttered and understood.

Payne v. Rouss, 46 App. Div. 315, 61 N. Y. Supp. 705.

Hayes v. Ball, 72 N. Y. 422.

Garby v. Bennett, 40 App. Div. 163, 57 N. Y. Supp. 853.

The court in *Moore v. Francis* (121 N. Y. 199, 23 N. E. 1127), stated that it was the settled law of this state that in a civil action for libel,

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police captain and put through the third degree, which brought out the fact that the two men who were under arrest tried to hire him to commit the murder; and in a libel action based on such article the plaintiff alleges, by way of innuendo, that the article charged that he was an intimate associate of criminals and murderers, that he could be induced by money to commit murder, that he had conceded his knowledge of facts relating to the murder until compelled to disclose it, and that it charged him with moral delinquency and failure to perform his duties as a citizen, thereby exposing him to ridicule, contempt, etc., to the injury of his character and business; it is for the jury to decide whether the article could be understood according to the meaning put upon it by the plaintiff.

3. Criminal Law — Third Degree — Meaning.

The expression of putting a person "through the third degree" has come to mean, commonly speaking, that he has been subjected to an extended and severe questioning, perhaps almost cruel in its rigor, at the hands of the police authorities, to elicit material facts, which are deemed to be within his knowledge.

Appeal from a judgment of the Appellate Division, First Department.

Whether publication is defamatory as question for jury.—Continued.

where the publication is admitted and the words are unambiguous and admit of but one sense, the question of libel is one of law which the court must decide. The trial court submitted the case to the jury, and the Court of Appeals held that the trial judge erred in not ruling the question of libel as one of law.

And Mr. Justice Edwards said: "It is only when the language is ambiguous, and permits of different constructions, any one of which makes it defamatory, that a question is presented for the jury to decide in what sense it was intended.

Zinserling v. Journal Co., 26 Misc. 591, 57 N. Y. Supp. 905.

The question of the interpretation of the ambiguous portions of an alleged libelous article, published in a newspaper, should be left to the jury, so that they may say what the publisher meant to have understood as the meaning of the language by the readers of the newspaper.

Garby v. Bennett, 40 App. Div. 163, 57 N. Y. Supp. 853.

In Calkins v. Wheaton (1 Edward's Sel. Cases, 226), it appeared that

1913] **Demos v. New York Evening Journal Pub. Co.**

Action by Emanuel J. Demos against the New York Evening Journal Publishing Co. to recover damages for libel.

Clarence J. Shearn, of New York City, for defendant-appellant.

Joseph M. Proskaner, of New York City, for plaintiff-respondent.

GRAY, J. This is an action of libel, and the complaint charges, in several causes of action, the publication and republication, in different editions of the defendant's newspaper, of the news item, which is alleged to be libelous. The pleading sets forth that "on September 23, 1906, the dismembered trunk of the dead body of a man was discovered in a pit, at the corner of Eleventh avenue and Thirty-Sixth street, in the borough of Manhattan, city of New York (and that said body was identified to be the body of one Jack Mano); that thereafter, and on September 24, 1906, one Capanake and one Dandrakes were ar-

Whether publication is defamatory as question for jury.—Continued.

the plaintiff, a drover, was in the habit of bringing cattle to market, for sale, a business in which credit was essential. The defendant, on one occasion, speaking of a particular debt which he claimed against the plaintiff, said of him, "he is not good for the debt" or "I do not consider him good," the witness could not say which was the expression used by the defendant. And on another occasion, he asked if the plaintiff, had come back from up the river, and told the witness he "thought it doubtful whether he would see him again" and said something about "the plaintiff giving him the slip." It was held, that it was for the jury to determine whether the words, as understood in their plain acceptation, were calculated to injure the plaintiff's credit, and to determine the sense in which the words were used, and for what intent and purpose they were spoken.

The proposition in *Woodruff v. Bradstreet Co.* (116 N. Y. 217, 22 N. E. 354), was whether to publish of a merchant or trader that a judgment has been recovered against him, is the employment of words in themselves libelous or slanderous as an imputation against the soundness of his per-

rested on suspicion by the police authorities of the city of New York, charged with having some connection with the murder of said person, whose body was found as aforesaid." The first alleged libelous publication was as follows: "Further testimony against the two men now held as suspicious persons was given to-day by John Demos, who runs a restaurant at Old Slip. He was taken before Acting Capt. Flannery, in the West Thirty-Seventh street station house and put through the third degree. The rigorous questioning of Demos brought out the statement that Dandrakes and Capanake had tried to hire him to kill Mano, offering him a large sum of money if he would put Mano out of the way." The succeeding publications complained of were, with no material changes in language, the following: "John Demos, who runs a restaurant in Old Slip, declared to the police to-day, after being put through the third degree, that John Dandrakes and George Capanake, 139 Eighth avenue,

Whether publication is defamatory as question for jury.—Continued.

sonal condition. As there was no ambiguity or uncertainty about the import of the words in question the court held that it was not a question for the jury but one of law for the court.

Whether an alleged defamatory article concerning a clergyman would have a tendency to deprive him of his office, or exhibit him as unfit to continue his calling, is a question, where it arises upon a construction of the article itself, to be determined by the court upon the fair and ordinary meaning of the words used in the article.

Potter v. New York Evening Journal Pub. Co., 68 App. Div. 95, 74 N. Y. Supp. 317.

The defendant in MacDonald v. Sun Printing & Publishing Assn. (45 Misc. 441, 92 N. Y. Supp. 37), published an article in reference to the plaintiff and a book which he had published. The inferences expressed in the article were that the conduct of the plaintiff and the book were a "scandal," "shameless," and that the plaintiff was "prurient." The court, in holding that it was for the jury to say whether the inferences drawn by the defendant from the facts were reasonably possible and therefore permissible said: "In the present case the plaintiff is charged with prurency, scandal and shamelessness. This affects his personal character. If his book and his conduct lay him open to the charge, the defendant did not

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under arrest in connection with the headless body mystery, had offered him a large sum of money to kill Jack Mano, now believed to be the victim." Following each allegation of the libel were the further allegations, by way of innuendo, to the effect that thereby the defendant intended to charge, and did charge, that the plaintiff was an intimate associate of criminals and murderers, or persons arrested upon the charge of murder; that the plaintiff could be induced by the offer of a large sum of money to commit murder; that the plaintiff had concealed his knowledge of facts relating to the murder, until taken into custody and compelled by the police authorities, through mental agony, physical torture, and severe cross-examinations, to disclose his knowledge, and that it was attempted to charge him with moral delinquency and failure to perform his duties as a citizen—thereby exposing him to the ridicule, contempt, prejudice, and hatred of the inhabitants of the city and state, and

Whether publication is defamatory as question for jury.—Continued.

go outside the realm of criticism, and is not liable. If they do not then the defendant is liable. It is not easy to determine whether the question presented, i. e., the question whether the inference drawn and expressed by the defendant is a reasonably possible one, and therefore permissible. is one of law or one of fact, i. e., a question to be decided by the court, or one to be decided by the jury. Cases could be imagined in which the question would be one of law. If, for instance, one should write advocating murder, it would be for the court to rule that the inference that he was a murderous character was permissible. Murder is an unmistakably defined crime, and there can be no doubt about what it is. But what of pruriency? It is an elastic term. Matter and conduct which some good people deem prurient other good people deem chaste. There is no fixed standard of pruriency. It is largely a matter of education and taste. And the same is true in respect of scandal and shamelessness. Nevertheless, one may do or say or write things that are beyond question scandalous, shameless and prurient, and that would be a case presenting a question of law and not of fact. But I am finally convinced that the present is not such a case. I have looked over the book carefully, and considered the plaintiff's conduct, and I think the question was for the jury, i. e., it was for them to say whether the inferences drawn by the defendant from the facts, were reasonably possible and therefore permissible."

to injury in his character and business as a restaurant keeper. The trial resulted in a verdict for the plaintiff and, on appeal from the judgment, the affirmance at the Appellate Division was with a sharp division in the vote of the justices.

I think that the judgment should be reversed, and that a new trial should be had for errors in the instructions of the trial judge. Having read to the jury the alleged libelous publications and the innuendos of the complaint, the trial judge charged that "the articles * * * are libelous per se." This was excepted to by the defendant. The defendant's counsel requested the trial judge to charge that "it is for the jury to determine whether the publication complained of is libelous," and, further, "that if the jury find that the publication complained of does not have the meaning claimed in plaintiff's innuendo, the part that your honor read from the complaint, and that the words in their natural sense are capable of an innocent meaning,

Whether publication is defamatory as question for jury.—Continued.

If an alleged libelous article is susceptible of more than one meaning, one of which would make it libelous, it is for the jury to determine whether or not the libelous meaning would be ascribed to it by readers of ordinary and average intelligence.

Klaw v. New York Press Co., 137 App. Div. 686, 122 N. Y. Supp. 437.

In Clark v. Anderson (11 N. Y. Supp. 729), the defendant published a letter concerning the plaintiff and another to the effect that they were conspiring together to swindle the defendant out of some money, "and I do not think you would be party to any such rascality if you knew it, and do not think the National Temperance Society can afford to take money not their due, under or through the help of blacklegs or scoundrels, through false representations or swearing." The trial court directed a verdict for the defendant, but the appellate court held that the question should have been submitted to the jury whether the effect of the language was such as to bring it within the purview of the statute which defined libel.

b. Article imputing unchastity.

In Woodruff v. Woodruff (36 Misc. 15, 72 N. Y. Supp. 39), it was complained that the defendant falsely stated that the plaintiff communicated

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not defamatory of the plaintiff, they should find a verdict for the defendant." These requests were refused, and the defendant excepted. Thus, as the case went to the jury, they were instructed upon the law that the publications were libelous *per se*, and they were precluded from considering their meaning, whether innocent or defamatory. With such instructions the jurors might well have regarded their duty as confined to the question of the amount of damages, which the evidence would justify them in awarding the person so libeled, and that they were not to concern themselves with the meaning of the words used.

It had been, evidently, the view of the plaintiff that the meaning of the article was not clear, inasmuch as it was thought necessary to aver, at considerable length in the complaint, what the defendant intended to charge by its publication. In my opinion, he was rightly advised, in supporting his cause of action by the allegation that the article was intended to be de-

Whether publication is defamatory as question for jury.—Continued.

to her husband a loathsome disease through their marital relations. The court in holding the case one for the jury said: "The facts having been pleaded, it is for the jury to say what the defendant intended by the language used. The facts alleged in the complaint must therefore be submitted to the jury. This must be so, even assuming that this is a case where the language used may be susceptible of an innocent meaning. It is also a question of fact for the jury to say whether the words were spoken maliciously, with the intent alleged in the plaintiff's complaint. It is an important question to be submitted to the jury as to what knowledge the defendant had of the situation and condition, and when and from whom that knowledge was obtained. * * * Whether the words spoken were slanderous *per se* is a question of law for the court; but the meaning of the words, and whether they were intended to be slanderous or to impute unchastity in the plaintiff, is a question of fact for the jury, when the specific language and all the facts and circumstances under which they were spoken have been produced from witnesses on the trial of the action."

Presiding Justice Smith in *Horton v. Binghamton Press Co.* (122 App. Div. 382, 106 N. Y. Supp. 875), spoke of two questions as being for the jury: "First, whether the allegation that plaintiff resided in a block which was the resort of prostitutes tended in any way to hold her up to

famatory in the respects averred; for I am unable to agree in the view that the reading of the publication, of itself, imports a disgraceful reflection upon the plaintiff's character, or standing, in the community.

The article relates to the possible culpability of two men, who were held upon suspicion of being concerned in a homicide. The plaintiff does not appear, from the article, to have been charged with it, or to have been arrested upon any charge, or to have been required by the police, except as a witness. It was in that capacity that he was brought before the police captain, and if he was "put through the third degree" to obtain his testimony, concerning the two men under arrest, the method of examina-

Whether publication is defamatory as question for jury.—Continued.

ridicule or contempt. If so, the jury might have been instructed that she was entitled to damages. Second, whether the allegation that her husband had obtained a divorce from her, which was false, did impute to her a fault or wrong which would tend to hold her up to contempt and scorn in the community. If so, the jury might have been charged that she was entitled to damages for such publication."

Schoonover v. Beach (23 N. Y. Week. Dig. 348, 36 Hun, 651), was an action by a married woman. The alleged slander was to the effect that the plaintiff's husband had his marriage certificate dated back, a child being born two weeks after the marriage. The court held that it presented a case for the jury.

The question presented in *Shea v. Sun Printing & Publishing Assn.* (14 Misc. 415, 35 N. Y. Supp. 703), was "Is it libelous to write of a married woman that she is living with a man not her husband?" The defendant contended that that statement in the article published had a perfectly harmless meaning. The court in holding that it was a question for the jury said: "The inquiry, however, is not whether the words could have been understood in any other way than as imputing a disgraceful charge to the plaintiff, but whether that is the construction which common people naturally put upon them, and this question is for the jury."

The question in *Upton v. Upton* (51 Hun, 187, 4 N. Y. Supp. 936), was whether to say of a married woman that she has a "bad disease" is equivalent to charging her with having the venereal disease. The court held that it was a question for the jury to be determined in the light of all the circumstances.

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tion may reflect discreditably upon the police officials; but how could it reflect upon the plaintiff's character, or reputation? The expression of putting a person "through the third degree" has come to mean, commonly speaking, that he has been subjected to an extended and severe questioning, perhaps almost cruel in its rigor, at the hands of the police authorities, to elicit material facts, which are deemed to be within his knowledge. If applied to a person under arrest in connection with the commission of a crime, its meaning would naturally be that the guilt of the person was suspected. When applied, as here, to obtain statements from a person concerning others, who were in police custody, it would ordinarily import a reluctance on his part to

Whether publication is defamatory as question for jury.—Continued.

In *Noonan v. Press Publishing Co.* (131 App. Div. 891, 115 N. Y. Supp. 379), it was alleged that the inference to be drawn from the article complained of was that the plaintiff was guilty of unchastity. The court, per curiam, without setting forth the alleged libelous publication held that it was a question of fact for the jury whether or not that was the only inference to be drawn from the article.

c. Article imputing crime.

The plaintiff in *Hayes v. Ball* (72 N. Y. 418), had been nominated for the office of supervisor of the town of Barne, and the alleged slander was "he would be a pretty man to be elected supervisor; when he was highway commissioner he stole \$1000 from the town, and if he was elected supervisor, where he would have the handling of so much money, he would steal \$8000." The court said: "If the words were ambiguous and capable of two constructions—one imputing larceny, and the other not, it was for the jury to determine in what sense they were understood."

In *Middleton v. Walter* (1 Week. Dig. 407, 67 N. Y. 584), where the plaintiff was charged with being a thief, the court left it to the jury to say whether the language used was used in the sense of imputing a felony or not.

The words proved as the alleged slander in *Dexter v. Taber* (12 Johns. 238), were "You are a thief; you stole hoop poles and saw logs from off Delancey's and Judge Myers' land." The judge told the jury that it was for them to decide whether the words amounted to a charge of theft, or

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testify, for which there might be an innocent reason, in his mental make-up, if not in his ignorance or his apprehensions. Certainly the words of this article do not directly charge the plaintiff with being in sympathy with the arrested men, or with having known anything of the crime before being brought before the police captain. Nor does his reported statement that the men "had tried to hire him to kill Mano," and had "offered him a large sum of money" to do so, necessarily have a disgraceful meaning. The article does not charge him with accepting, or even with considering, the offer. According to the article, the "rigorous examination" to which the plaintiff was put resulted in showing that the suspected criminals had failed in an effort to bribe him.

Whether publication is defamatory as question for jury.—Continued.

of trespass merely, and the appellate court held that it was properly left to the jury.

The plaintiff in *Cornish v. Bennett* (38 Misc. 688, 78 N. Y. Supp. 244), complained that a certain published article insinuated that he had a guilty relationship with the murder of a certain person. The court in its opinion said: "If it should be considered doubtful whether the above publication, under the alleged widely understood circumstances, would convey to the ordinary reader the idea and insinuation that the plaintiff had some feloniously guilty connection with the murder of Mrs. Adams, or that, instead thereof, it would convey to such reader an innocent meaning, it should be left to the jury to determine the question.

While the court in *D'Andreas v. New York Press Co.* (61 App. Div. 605, 70 N. Y. Supp. 759), held that the alleged libelous publication was libelous *per se* as its tendency was to injure the plaintiff, and hold him up to obloquy, it added: "However, if the article would not warrant our going so far, and if we take the view most favorable to the defendant that the language is of doubtful significance, and does not directly charge or insinuate that the plaintiff was guilty of a crime, and is not *per se* defamatory, then under the authorities, there was clearly a question for the jury as to the meaning to be attached to the language.

The inquiry in *Warner v. Southall* (165 N. Y. 496, 59 N. E. 269), was as to "whether, in the connection in which the words proved were used by the defendant, they were capable of a construction imputing arson to the plaintiff, and whether they might have been so understood," and the court finding in the affirmative held that the case should have gone to the jury.

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While, therefore, it is not easy to perceive how the publication complained of could have had the defamatory effect upon the plaintiff's character and standing complained of, nevertheless, as it cannot be said, as matter of law, that it was incapable of a defamatory meaning, the trial judge should have allowed the jurors to decide whether it could be understood according to the meaning put by the plaintiff upon it by innuendo. Under the settled rule of law, if the language of the alleged libel is ambiguous and capable of an innocent, as well as of a disgraceful, meaning, the question becomes one for the jury to settle. *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725. If the words used are capable, by construction, or in their connection and application, of the interpretation given by the innuendo, then a

Whether publication is defamatory as question for jury.—Continued.

d. Article in criticism of public officer.

The articles complained of in *Hoey v. New York Times Co.* (138 App. Div. 149, 122 N. Y. Supp. 978), as libelous were in criticism of a public officer. The court in its opinion said: "It is to be borne in mind that the plaintiff was entitled to have the case submitted to the jury, either if the articles were libelous *per se*, without any innuendo, or if they were susceptible of the meaning ascribed to them in the innuendo, for, if libelous *per se*, it would be the duty of the court to so decide as a matter of law, but if ambiguous, and in any aspect of the case the articles are susceptible of the meaning ascribed to them in the innuendo, it would be the duty of the court to leave it to the jury to determine in what sense the words were used and would be understood by readers of ordinary and average intelligence, and if they would be so understood that they would be libelous.

In *Dolloway v. Turrill* (26 Wend. 383), it was shown that the article published charged a public officer who was a candidate for congressman with putting his official signature to an affidavit under the statement that the person who signed was duly sworn when in truth he was not sworn, and further that the affidavit was used for the purpose of preventing the re-appointment of a collector of customs. The appellate court held that the intent of the defendant and the import of the words used were properly submitted to the jury.

The alleged libelous publication in *Vincent v. Onderdonk* (107 App. Div. 626, 95 N. Y. Supp. 347), was in reference to the county counsel. The appellate court in reversing the judgment of the trial court held that it was for the jury to determine in which sense the words were used.

question of fact is raised for the jurors to consider. They should determine, in a case of doubtful meaning, whether the tenor and import of the publication are offensive and defamatory, and whether it could be so understood by the general public, or in the plaintiff's neighborhood. The mere improbability of the meaning claimed for it would not control the question of the right of the jury to pass upon it; the question would be, May the alleged libel be understood as the plaintiff claims?

For the erroneous instructions and rulings which I have mentioned, I advise the reversal of the judgment, and that a new trial be ordered, the costs to abide the event.

CULLEN, C. J., and WILLARD BARTLETT, HISCOCK, CHASE, COLLIN, and MILLER, JJ., concur.

Judgment reversed, etc.

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Boyle v. Bush Terminal R. Co.*(Court of Appeals, March, 1913.)***BOYLE, Respondent, v. BUSH TERMINAL RAIL-ROAD CO., Appellant.**

(210 N. Y. 389, 104 N. E. 933. *Rev'g* 151 App. Div. 551, 136 N. Y. Supp. 355. *Over'g* *Bermel v. New York, N. H. & H. R. R. Co.* 172 N. Y. 639, 65 N. E. 1113. *Aff'g* 62 App. Div. 389, 70 N. Y. Supp. 804.)

1. Carriers — Carriers of goods — Amount of liability — Limitation by contract fixing rate.

A contract between carrier and shipper fixing the value of the goods shipped for the purpose of determining the rate of charge and the

Note. — Limitation of amount of liability of carrier of goods.

- a. *In general*, 406.
- b. *Limitation clause as including negligence of carrier*, 412.
- c. *Effect of shipper's silence as to value of goods*, 414.
- d. *Presumption as to shipper's knowledge of limitation in contract*, 416.
- e. *Application of limitation*, 419.
 - 1. *Where goods are sent C. O. D.* 419.
 - 2. *Where several articles or packages are shipped*, 419.
 - 3. *Where carrier disobeys direction to stop goods in transit*, 420.
 - 4. *Where action is for negligence in not delivering goods within reasonable time*, 421.
- f. *Limitation based on declared value*, 421.
- g. *Limitation in accordance with published rate*, 421.
- h. *Limitation per hundredweight*, 422.
- i. *Fraud as affecting limitation*, 424.
- j. *Misfeasance affecting limitation*, 425.
- k. *Parol agreement as affecting limitation*, 426.
- l. *Carriage of live stock*, 426.
- m. *Application of Public Service Commission Law § 38*, 427.
- n. *Interstate Commerce Act § 20 as affecting limitation*, 428.
- o. *Carmack amendment to Interstate Commerce Act as affecting limitation*, 429.
- p. *Provision of Kentucky Constitution as affecting limitation*, 430.
- q. *Analogous cases*, 431.

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liability of the carrier in case of loss or damages, concludes the shipper, though the loss or damages is due to negligence.

Appeal from a judgment of the Appellate Division, Second Department.

Action by John Boyle, shipper, against the Bush Terminal Railroad Co. impleaded with another, to recover damages for loss of goods.

I. R. Oeland, of Brooklyn, for defendant-appellants.

Wilmot L. Morehouse, of Brooklyn, for plaintiff-respondent.

MILLER, J. The decision of this appeal turns on the construction and effect of the following special contract entered

Limitation of amount of liability of carrier of goods.—Continued.

a. In general.

Though the duty of a common carrier, and the rigorous liability which is upon him at common law, arises principally from the public employment which he exercises; yet his hire and reward also enter therein, and he has a right that his compensation shall be in measure with the risk he takes, and that he shall not be subject to unknown hazards.

The text case overrules *Bermel v. New York, N. H. & H. R. R. Co.* (62 App. Div. 389, 70 N. Y. Supp. 904, affirmed on opinion below in 172 N. Y. 639, 65 N. E. 1113). The facts in that case were as follows: The plaintiff purchased a granite monument of the value of \$122.00 to be shipped to him by the vendors from Quincy Adams, Mass. free on board the cars. The vendors delivered the monument to the defendant and made out a bill of lading under which it was to transport the property. Upon the printed form which they filled out they stamped, with a stamp kept for that purpose, the following: "6 Pcs. Box'd Granite Mon'm'ts, Owner's Risk Released. Valuation restricted to 40 cts per cubic foot." These words were inserted in a blank left for that purpose. As a result of the defendant's negligence the monument was totally damaged in transit. The value inserted in the bill of lading, that is, "40 cents per cubic foot" amounted to \$29.00. In the Court of Appeals Mr. Justice O'Brien writes a dissenting opinion (with which Judge Gray concurs), in which, after setting forth the general principle that a shipper can only recover the sum specified as

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into between shipper and carrier indorsed on the bill of lading and signed by the shipper: "The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation." The value of the shipment was stated to be \$5 per 100 pounds and the weight 3,750 pounds. The question arises on the exception to the refusal of the court to charge that the damages must be limited to \$5 for each one hundred pounds in weight of the property shipped.

Although the rule in the federal courts, unlike that prevailing in this state, has always been that a common carrier could not exempt himself from liability for negligence even by ex-

Limitation of amount of liability of carrier of goods.—Continued.

the limit of the carrier's liability where he has entered into a contract limiting the liability to a certain sum in consideration of a reduced rate for transportation, says: "Such a limitation in the bill of lading will protect the carrier even though the loss or injury is the result of negligence." And speaking of the contract or bill of lading he says: "There is no ambiguity or want of clearness in the words of the restriction. The words "Valuation restricted to forty cents per cubic foot" are so plain and clear that no one could fail to mistake their meaning. They obviously meant and were so understood by the shipper to restrict the value to be placed upon the property to a certain sum in case it was lost from any cause for which the defendant was responsible, even though that cause was its own negligence. No one had a clearer notion of the importance of this restriction than the shipper himself who inserted it in the contract. He knew from his own experience as a shipper and from the custom of the business that by inserting the restriction he would procure a material reduction in the compensation of the carrier, and of course knew that he could not obtain that advantage for himself or his consignee without some corresponding benefit to the defendant. It seems to us that the contract was fairly made and conforms to the intention of the parties and should be enforced like other contracts; so the judgment should be modified by reducing the recovery to twenty-nine dollars, which is conceded to be the valuation of the property under the restriction in the bill of lading."

press words, it is settled by the decisions of the United States Supreme Court that a contract limiting liability to a value agreed upon for the purpose of fixing the rate is valid, and that holding is based on the principles of the common law, and not, as is said, on the provisions of the so-called Carmack amendment. *Adams Express Co. v. Croninger*, 226 U. S. 491 and cases cited on page 510, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L.R.A.(N.S.) 257; *Kansas Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. 683; *Mo., Kan. & Tex. Ry. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690.

The question considered in those cases, as far as that amendment was concerned, was whether it prevented, not whether it permitted the making of such contracts, as is pointedly shown by a quotation from the opinion of the present chief judge of this court in *Greenwald v. Barrett*, 199 N. Y. 170, 175, 92

Limitation of amount of liability of carrier of goods.—Continued.

In *Bernstein v. Weir* (40 Misc. 635, 83 N. Y. Supp. 48), the plaintiffs had a book of Adams Express Company's freight receipts. One of these was filled out by the plaintiffs and given to the express company for signature with the article for shipment. Nothing was said as to the terms of the receipt, or as to the contents or value of the package. An employee of the express company, in the presence of the plaintiffs' representative, stamped the receipt "Value asked and not given," and returned it to the plaintiffs. The receipt contained the following provision: "It is part of the consideration of this contract, and it is agreed that the said express company are forwarders only, and are not to held liable or responsible for any loss or damage * * * arising from the danger of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from whatever cause, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company, or their servants; nor, in any event shall the holder hereof demand beyond the sum of \$50.00, at which the above property forwarded is hereby valued, unless otherwise herein expressed or unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company." The court in holding this contract effective to limit the liability of the express company to the agreed valuation of \$50.00, said: "When the blank receipt was filled up by the plaintiffs at their own office,

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N. E. 218, 219 (35 L.R.A.[N.S.] 971), made by Mr. Justice Lurton in *Adams Express Co. v. Croninger*, *supra*, to wit: "The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried, and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in *Hart v. Penn. R. R. Co.*, 112 U. S. 331, 341 [5 Sup. Ct. 151, 28 L. ed. 717]."

It is difficult to understand how more appropriate words could be used to express an agreement fixing a value as a basis for determining the rate and the amount of liability of the car-

Limitation of amount of liability of carrier of goods.—Continued.

and the receipt, as thus prepared, was thereafter, namely, at the time of the delivery of the merchandise for transportation, presented by the plaintiffs to the employee of the express company for signature, it instituted a proposal on the part of the plaintiffs for a special contract, which was wholly of their own creation. And as every person is presumed to intend that which is the ordinary and natural consequence of his own proposed act, it must further be held that when the express company assented to such proposal, by signing the same and delivering it to the plaintiffs, the proposal ripened into a special contract, and as such it became binding upon both parties."

In *Belger v. Dinsmore* (51 N. Y. 166, 10 Am. Rep. 575), the terms of the freight receipt were identical with those of the receipt in the *Bernstein* case, *supra*. The court in holding that it was a binding contract limiting the amount of the defendant's liability, said: "The instrument relied on as evidence of the contract, as has already been stated, does not merely acknowledge the delivery and receipt of the property in question to the express company for transportation, but, in connection therewith, it is declared to be a part of the terms and conditions on which it was received that the company was not to be responsible for loss and damages resulting from certain specified causes, unless proved to have occurred from fraud or gross negligence of the company or its agents; and that the holder

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rier in case of loss or damage than were used in the special contract above quoted. The rule in this state is that, although a common carrier may by contract exempt itself even from negligence, it cannot do so by general words. *Mynard v. Syracuse, B. & N. Y. R. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28. But the contract in this case did not provide for exemption from liability. On the contrary, the agreement fixed the value of the goods and thereby measured the liability of the carrier for damage or loss, whether from negligence or otherwise. The carrier's charge was based on the agreed value. For that charge it contracted to be responsible for the safety of goods of that value. The shipper should not be allowed to have one part of the agreement, i. e., the reduced rate, and reject the other, i. e., the agreed value. The respondent, however, and the learned court below relied upon the case of *Bermel v. N. Y., N. H. & H. R. R. Co.*, 62 App. Div. 389, 70 N. Y. Supp. 804, affirmed

Limitation of amount of liability of carrier of goods.—Continued.

thereof should not, in any event, demand beyond the sum of fifty dollars, fixed as the value of the article to be carried, unless otherwise expressed. A party accepting such an instrument, as has been already shown, declares his assent by such acceptance, to those terms and conditions. They thereby become obligatory on both parties, and prescribe their mutual rights and obligations. On the application of that rule to this case, the plaintiff assented (by omitting to have a different value expressed in the instrument) to the valuation of the property in question at the sum of fifty dollars, and to the restriction and limitation of his claim and demand for damages, in case of its loss, at that sum. Such liquidation of its value was for the advantage of both parties, to guard against controversy or difference of opinion in estimating it, in case of loss and damage, and as a protection against fraud. It is reasonable to assume that the price or compensation for the transportation of property has relation to the restricted or limited liability assumed on agreeing to transport it, and is to a great degree regulated and graduated by its value; and if a party only pays the price fixed for articles of small value, or estimated at a low sum, he himself bears all risks beyond that value or price. The plaintiff in this case must be assumed to have paid freight on the trunk in question and its contents, worth \$467, at the rate prescribed for an article not exceeding fifty dollars in value. He was then willing and agreed to assume all risks for the excess in value, and to relieve the company from

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on opinion below, 172 N. Y. 639, 65 N. E. 1113, as establishing the rule in this state that there was no limitation of liability for negligence even in such a case, unless expressly provided for. We shall not attempt to distinguish the Bermel Case from the case at bar. Though not expressly overruled its authority has been greatly weakened by subsequent decisions of this court.

In *Tewes v. North Ger. Lloyd S. S. Co.*, 186 N. Y. 151, 152, 78 N. E. 864, 865 (8 L.R.A.[N.S.] 199, 9 Ann. Cas. 909), the contract was one between a passenger and a steamship company governing the transportation of baggage of the passenger and provided as follows: "It is also agreed that neither the shipowner, nor the passage broker or agent, nor the ship, is in any way liable for loss of or injury to or delay in the delivery of luggage or personal effects of the passengers beyond the amount of fifty dollars, unless the value of the same in excess of that sum be declared at or before the issue of

Limitation of amount of liability of carrier of goods.—Continued.

all liability on account thereof beyond that sum. He can with no more propriety or justice claim remuneration therefor than the company could demand additional freight thereon."

In *Wilson v. Platt* (84 N. Y. Supp. 143), the court said that the facts of that case came within the doctrine laid down in the *Bernstein* case, *supra*, and held that the plaintiff's recovery was properly limited to \$50.

The material provision of the shipping receipt in question in *Hirsch v. New York Dispatch & Delivery Co.* (85 N. Y. Supp. 198), was as follows: "The company shall not be held responsible, nor shall any demand be made upon said company beyond the sum of fifty dollars for each article therein receipted for, unless the just and true value thereof is stated herein." No value was stated or inserted in the receipt. The goods were lost. The defendant showed that, in case any packages received by it were mentioned or known to be of a value of more than \$50, it took special care of them by placing them in its inner office, and making special arrangements for their delivery, and also that an additional charge was made for the delivery of packages valued at more than \$50. The court held that in view of these facts and the absence of any affirmative act of wrongdoing on the part of the defendant company it could invoke the benefit of the limited liability clause.

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this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon."

In *Gardiner v. N. Y. C. & H. R. R. Co.*, 201 N. Y. 387, 388, 94 N. E. 876, 877 (34 L.R.A.[N.S.] 826, Ann. Cas. 1912B, 281), the contract was one between a passenger and a railroad company governing the transportation of baggage on a 50-trip family ticket which contained the following provision: "Conditions. In consideration of the reduced fare at which this ticket is sold, the purchaser agrees that its use shall be subject to the following conditions: * * * (3) That this company's liability for baggage belonging to each passenger shall not exceed fifty dollars (\$50)."

In the tariff published by the company there was a provision for rates on baggage in excess of the free allowance.

In principle we can see no distinction between this case and the *Tewes* and *Gardiner* Cases. The contract in those cases provided for free transportation of baggage up to fifty dollars and for a charge beyond that sum. In this case the parties have agreed upon a valuation of the articles shipped for two purposes: (a) To determine the charge to be paid the carrier;

Limitation of amount of liability of carrier of goods.—Continued.

b. Limitation clause as including negligence of carrier.

It is the law of this state, as settled by many decisions of this court, that a common carrier may limit his liability by contract; and the contract may provide for immunity from the negligence of the carrier, or that of its agents; but where the latter object is sought to be accomplished, the contract must be aptly expressed and in unequivocal terms.

The receipts given the shipper in *Rappaport v. White's Express Co.* (164 App. Div. 576, 131 N. Y. Supp. 131), contained the following: "Nor shall they be liable for loss or damage to any goods, wares, merchandise, or packages caused by the wrongful, willful, negligent, or other acts of the agents or servants of White's Express Company, in an amount exceeding fifty dollars, unless the just and true value is stated in writing and an additional amount paid under special agreement made in writing at the office of the company." It was not shown that there was any such statement or agreement, and the court held that the defendant's liability was

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(b) to measure the carrier's liability in case of loss. According to every rule of fair dealing both parties should be bound by the contract, unless the court is to interpose restrictions upon the right of shippers to contract. We are not disposed to make distinctions based upon the varying circumstances of different cases, unless they involve a difference of principle, but hold that a contract between carrier and shipper fixing the value of the goods shipped for the purpose of determining the rate of charge and the liability of the carrier in case of loss or damage concludes the shipper, though the loss or damage may be due to negligence. In so far as the *Bermel Case* conflicts with that rule, it must be considered as overruled.

The judgment of the Trial Term and of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

**WILLARD BARTLETT, C. J., and WERNER, HIS-
COCK, CHASE, COLLIN, AND HOGAN, JJ., concur.**

Judgment reversed, etc.

Limitation of amount of liability of carrier of goods.—Continued.

limited under such provision, even as a common carrier, as against the negligence of its employees.

Scott, P. J. in *Royal Costume Co. v. Weir* (48 Misc. 376, 95 N. Y. Supp. 575), followed the decision of the court in the *Bernstein case*, supra, in holding that a clause in an express receipt limiting the extent of the company's liability, where the value of the package intrusted to it is not stated, is binding upon the shipper, in an action to recover for the loss of the goods shipped, due to the company's negligence.

It was held in *Maguin v. Dinsmore* (56 N. Y. 168), that the clause there construed did not limit the carrier's liability to fifty dollars in case of negligence; the court saying that "if it be desired that the clause shall cover losses by negligence, it is not too much to say that the purpose must be clearly expressed." The clause referred to was as follows: "If the value of the property above described is not stated by the shipper, the

Limitation of amount of liability of carrier of goods.—Continued.

holder hereof will not demand of the Adams Express Company (the defendants) a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid." Although the limitation clause in that case differs from that in the text case, the decision is no doubt affected by that in the text case.

In *Westcott v. Fargo* (61 N. Y. 542, 19 Am. Rep. 300), the court held that the stipulation in the express company's receipt that it should "not be liable for any loss or damage of any box, package or thing over fifty dollars, unless the just and true value is herein stated," did not include a loss caused by the negligence of the express company. This case is also rendered valueless by the text case.

The contract of carriage in *Blum v. Monahan* (36 Misc. 179, 73 N. Y. Supp. 162), was as follows: "It is mutually agreed that the liability of Monahan's express will not exceed \$50 unless a greater value is stated or receipted for. Accidents caused by fire or water while on transit, at owner's risk. Articles of glass, or contained in glass, received at owner's risk." This case followed *Westcott v. Fargo*, supra, and falls with it.

In *Marquis v. Wood* (29 Misc. 590, 61 N. Y. Supp. 251), the contract provided that the express company "shall not be liable for any loss or damage to said property exceeding the sum of \$50." The court held that the carrier did not, by this attempt to limit his liability, relieve himself from a loss occasioned by his own negligence, and the court added, "nor would that appear to be the full limit intended to be fixed by the company in the present case, for the receipt also contained the words, 'nor in any event shall said company be liable for more than the true value of the property.'" While the wording of this last clause of the contract is different from those before considered, the decision has nevertheless lost its authority because of the opinion in the text case.

c. Effect of shipper's silence as to value of goods.

As a general rule, the carrier, because of his public employment, must take and carry that which is offered to him therefor. But he ought to have a reasonable reward for the carriage. As the risk of carriage of a parcel of much value is greater than of one of mean value, the reward for it should be greater. And as the risk is greater, so should the care be greater, and so it will be if the value be known. Thus it appears that the carrier should know of the value of the package which he is called upon to carry, that he may exact his due reward, and take due care. And in the absence of agreement for a limited liability, it is the duty of the carrier to make all needful inquiry as to value. But when the shipper agrees with the carrier for a limited liability, he thereby expresses to the latter his estimate of the risk to be run and of the care needed, i. e.,

Limitation of amount of liability of carrier of goods.—Continued.

by accepting carriage upon the terms of a limited liability, the shipper indicates his judgment of the degree of the risk and of the needed care. Now if he remain silent as to the real value, such silence is the same as an assertion of mean value, thus keeping from the carrier his adequate reward, as well as misleading him as to the degree of care and security which he should provide. It is a concealment of an important fact in entering into the bargain to be made, such a concealment as amounts to a fraud in law upon the carrier.

Thus, where the contract between the parties provides that if the shipper does not state the value of the property shipped he will not demand a sum exceeding \$50.00 for the loss, detention or damage thereof, the shipper cannot escape the limitation by silence. *Magnin v. Dinsmore* (70 N. Y. 410, 26 Am. Rep. 608). In that case Judge Allen said that silence as to the real value of goods delivered for carriage is a fraud upon the carrier which will discharge the carrier from any liability for ordinary negligence over and above the limitation in the contract; and this is true although there is no inquiry by the carrier as to the value of the goods, and even though the shipper uses no artifice, to conceal the value, or to deceive the carrier.

The *Magnin* case reached the Court of Appeals four times, being reported in 53 N. Y. 652; 56 N. Y. 168; 62 N. Y. 35, 20 Am. Rep. 442, 50 How. Pr. 457; and as cited above. In 62 N. Y. Judge Folger said: "A shipper may become chargeable with fraud upon a carrier, through imposition and deception, as well when he is silent as when he speaks that which is untrue. A neglect to disclose the real value of a package, and the nature of its contents, if, therewith, there is that in its form, dimensions and other appearance designed, and even if not designed, if fitted, to throw the carrier off his guard, will be conduct amounting to the fraud now spoken of. The intention to impose upon the carrier is not material; it is enough if such is the practical effect of the conduct of the shipper." And in conclusion the court said: "The defendant is right in its claim, that the question of concealment of value, upon the undisputed facts of the agreement and of the silence of the plaintiffs, was one of law for the court, and not of fact for the jury; and that silence only as to value amounted to such an imposition upon the defendant, as would relieve it from a liability for the total value of the goods, unless something more in its conduct is shown than negligence to carry safely and to deliver promptly."

In *Feld v. Platt* (59 Misc. 226, 110 N. Y. Supp. 1118), the court held that a \$50 limitation clause in an express shipping receipt was binding upon the shipper. There was some evidence to the effect that the shipper's wife said she wanted the goods "insured," yet she did not disclose the nature and value of the property to the expressman when the prop-

Limitation of amount of liability of carrier of goods.—Continued.

erty was delivered and the receipt given. The court said that the disclosure of the value of the goods was a condition precedent to the attaching of any liability to the carrier for merely ordinary neglect, unaccompanied with any misfeasance or willful act. To quote: "It seems strange, in this commercial age, that people of ordinary prudence intrust so much valuable property to ordinary common carriers thereof, without even exercising the forethought of giving the true value of the same, or perhaps forgetting to give its true value. It may be it is thrift which brings upon them this spirit of forgetfulness, yet 'thrift is a blessing if man steals it not.'"

The shipping receipt or contract construed in *Toy v. Long Island Railroad Co.* (26 Misc. 792, 56 N. Y. Supp. 182), contained the usual clause that the company would not be responsible beyond the sum of fifty dollars, unless the just and true value of the property was stated. The court held that the plaintiff, by accepting carriage upon terms of a limited liability, and being silent as to the real value of the articles, in effect indicated the value at which they were to be taken, and also the degree of care and security to be provided.

Goodfield v. Platt (130 N. Y. Supp. 180), was an action to recover damages for the loss of a mandrel delivered to the defendant express company for shipment. The court held that the \$50 limitation of liability contained in the receipt was controlling as no other value was given.

The court in *Magnus v. Platt* (62 Misc. 499, 115 N. Y. Supp. 824), in holding that the limitation of claim and recovery against the carrier to \$50 was good inasmuch as the value was not stated, based its decision upon the *Tewes* case *infra*.

In *Bates v. Weir* (121 App. Div. 275, 105 N. Y. Supp. 785), a person owning lace valued at \$6,000 delivered the same to a cleaner who afterward shipped it by the Adams Express Company (the defendant), addressed to the owner, in a box not indicating the nature of the contents and without stating its value. Twenty-five cents was paid for expressage, and the usual receipt limiting liability to \$50 was given. The lace was lost in transit, and the court held that the owner was estopped from asserting that the lace shipped was worth more than \$50. Judge Miller in his opinion said: "The question is what was the defendant's duty to the plaintiff? I think it owed him no duty as a common carrier, except subject to the terms of its contract. It contracted to carry and deliver to the plaintiff an article worth \$50, and became an insurer against everything except the acts of God and the public enemy; but it never assumed that obligation respecting an article valued at \$6,000."

d. Presumption as to shipper's knowledge of limitation in contract.

It is now well settled that where a shipper of property enters into a

Limitation of amount of liability of carrier of goods.—Continued.

contract with a common carrier whereby, in consideration of an agreement of the latter to transport the property at reduced rates, it is stipulated that in the event of loss or injury resulting from causes which would make the carrier liable the liability will be limited to an amount not exceeding a valuation specified, the shipper in case of loss or injury is not entitled to recover more than the sum specified, and it is incumbent upon the shipper to acquaint himself with the contents of the contract executed by him, and in case he fails to do so he will be held chargeable with knowledge thereof.

A shipper who receives a shipping receipt or bill of lading without objection, in the absence of imposition, misrepresentation, fraud, or concealment, is bound by its terms and cannot set up his failure to read or understand in order to prevent its legal effect. *Lansing v. New York Central & H. R. R. Co.* (52 Misc. 334, 102 N. Y. Supp. 1092). In that case the property shipped was household goods and the bill of lading contained the following: "Valuation restricted to \$5.00 per 100 pounds. The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specific valuation named in case of loss or damage from cause which would make the carrier liable because of the lower rate thereby accorded for transportation."

In *Zimmer v. New York Central & H. R. R. R.* (137 N. Y. 460, 33 N. E. 642), the plea was made that the plaintiff did not know of the terms of the contract, but the court said that this was of no consequence. Plaintiff's agent, Coolidge, applied to the defendant for a car in which to effect the transportation of a horse valued at \$5,000.00. A contract was filled out and signed by Coolidge and an agent of the defendant. The contract recited that the company transported live stock at certain prices "carrier's risk," and at reduced prices, upon certain risks being assumed by the shipper, and upon the condition that the property was valued as stated below. The contract then read: "Now in consideration that said company will transport at said reduced prices, one horse valued at not exceeding \$100 * * * consigned to G. P. Coolidge at Antwerp, N. Y., it is * * * agreed that in the event of the loss, death or injury of the animals, or any of them, from causes which would make the carrier liable, such liability shall not, in any case, exceed an amount to be fixed according to the above valuation." The court in its opinion said: "Coolidge was his (plaintiff's) agent, and will be presumed to have known and to have assented to the stipulation in the contract, which limited the general liability of the carrier. That presumption always holds good, unless some fraud, or deception, is practiced, which was not the fact in this case. There can be no question about the reasonableness of such a contract. It was based upon the consideration of a rate of transportation, far below what

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it would have been, if the carrier had assumed all the risks. It was entered into with full opportunity for ascertaining its terms, and it was incumbent upon the shipper, or owner, to acquaint himself with them, and if he has not done so, he will, nevertheless, be held chargeable with their knowledge."

In *Greenwald v. Barrett* (199 N. Y. 170, 92 N. E. 218), the shippers had employed the same form of receipt in shipping goods by the Adam's Express company for a period of six years, and the court held that they must be charged with a knowledge of its contents in the absence of any proof whatever that they were not acquainted therewith. In its opinion the court said: "In order to regulate its charges to its customers with reference to the value of the property transported, a common carrier may demand of the shipper a declaration of such value, or may agree with him that in default of a statement the value shall be deemed a given amount. This agreement may be direct and express or it may arise indirectly out of the acceptance by the shipper of a receipt from the carrier in which it is stated that the value is to be considered a sum specified if no other has been given by the shipper. Such was the character of the receipt given by the representative of the express company in the present case. * * * There was a book of blank receipts in their (shippers') custody and they made the entries in the blanks themselves and completely prepared the receipts for signature by the express company's driver when he called for and took the goods."

In *Bernstein v. Weir* (40 Misc. 635, 83 N. Y. Supp. 48), it was the plaintiffs' contention that the receipt in question was not binding on them because it was one out of a book of receipts given them by the express company as receipts, that the contents of said receipts had never been called to their attention, that they had never read the same, and that they did not know that each of said receipts contained a contract, but the court held that they were, nevertheless, bound by the terms and conditions of the receipt which constituted the contract of shipment.

In *Falkenau v. Fargo* (35 N. Y. Super. Ct. (3 J. & S.) 332, affirmed 55 N. Y. 642), the court, in referring to the contract limiting the amount of the defendants' liability, said: "In regard to the provisions of that contract, plaintiffs cannot be permitted to plead ignorance."

In *Belger v. Dinsmore* (51 N. Y. 166, 10 Am. Rep. 575), plaintiff's counsel objected to the admission of the freight receipt in evidence because there was no evidence adduced that the knowledge of the contents of the receipt was ever brought home to the plaintiff. The court in holding the position untenable, said: "The presumption of law is, that a party receiving an instrument, in the transaction of any business, is acquainted with its contents. It is not shown, nor is there any evidence whatever

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warranting the inference, that the wife of the plaintiff, when she took the receipt, did not know and was not fully informed of what provisions it contained and fully understood them. The instrument itself bears on its face notice that it is not merely a receipt for goods, in the ordinary acceptance of the term. It is of considerable length, containing several consecutive provisions, and the one in question is immediately after the acknowledgment that the articles were received for transportation, and a party receiving that acknowledgment would naturally direct his attention to what follows it, and read it; and I find no proof showing or tending to show that it was not all read and understood. So far as the case shows, the business was transacted with due care and deliberation by the plaintiff's wife, and there was no fraud, imposition, concealment or improper practice or conduct of any kind on the part of the express company or its agents in the progress of the transaction, and I am not aware of any rule or principle, nor has the counsel of the plaintiff advised or informed us of any, which requires a party giving an instrument to another, declaratory of their mutual rights and obligations, to prove affirmatively that the person receiving or accepting it had knowledge of its contents, in the absence of any proof or circumstances either to raise the presumption or inference of the want of such knowledge or in any manner tending to impeach the bona fides of the transaction."

*e. Application of limitation.**1. Where goods are sent C. O. D.*

Where goods are sent C. O. D., and the amount to collect is over \$50, the carrier is sufficiently informed of the value of the goods, so as not to be protected by the usual \$50 dollar limitation clause in the shipping receipt.

Van Winkle v. Adam's Express Co., 26 N. Y. Super. Ct. (3 Rob.) 59.

2. Where several articles or packages are shipped.

The shipping receipt in *Greenfield v. Wells, Fargo & Co.* (134 N. Y. Supp. 913), contained the following provision: "The charge for carrying said property being based upon a valuation not exceeding fifty dollars, unless a greater value is declared, it is hereby agreed that the company shall not be liable in any event for more than fifty dollars unless a greater value is stated herein, and in case of partial loss or damage, shall not be liable for more than such proportion of same as fifty dollars, or the value declared herein, bears to the actual value, if greater." There were three articles covered by the receipt, one of which was lost. The court held that plaintiff was only entitled to recover such proportion of fifty dollars as the value of the article lost bore to the whole shipment.

In *Wetzell v. Dinsmore* (54 N. Y. 496), it appeared that one package

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on a higher basis of value than \$100 per ton." Pig iron of the actual value of \$1,608.13 was lost in shipment. In holding that the plaintiff could recover only at the rate of \$100 for each ton or fraction thereof lost, the court said: "The valuation declared or agreed upon, as evidenced by the contract of shipment upon which the published tariff rate was applied, is conclusive between the parties. Where there are two rates, based upon valuation, then the valuation which the shipper declares is the one applicable, and if such rate be filed, as required by law, the shipper is bound to take notice of it, whether called to his attention or not. The bill of lading does not conflict with the defendant's published rate. It is simply explanatory of the rate, and the rights of the parties, therefore, are determined by its clauses in bills of lading, not in conflict with the published rate, limiting a common carrier's liability, are lawful, and when the rates for shipment are fixed according to valuation, such valuation applies to each part of the cargo and not to the whole cargo. The plaintiff expressly agreed, when it shipped by the lower rate, that in case of loss or damage it would not assert a claim—that is, that the defendant should not be liable—to exceed \$100 per ton for the tin lost or damaged. Defendant had a right to enter into this agreement, because, as indicated, it did not conflict with the published rate. Plaintiff, however, contends it could only ship, under the rate which it accepted, an entire car load, which, in the present case, according to the submission, was of the value of \$1,800; that therefore it is entitled to recover the full value of the tin lost so long as it does not exceed the value of the entire car load. In my opinion this is not a fair construction to be put upon the published rate, supplemented and explained as it was, by the clause stamped upon the bill of lading."

h. Limitation per hundredweight.

In *Carleton v. Union Transfer & Storage Co.* (137 App. Div. 225, 121 N. Y. Supp. 997), the plaintiff was awarded a verdict of \$600 against the railroad company, which was sued with the transfer company, for damages to household goods shipped by said company. Stamped on the bill of lading was the following clause: "The consignor of this property has the option of shipping same at a higher rate without limitation as to the value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby agreed for transportation." The following was also stamped upon the bill of lading, "Valuation restricted to \$5. per 100 lbs." It also showed that the freight charges were \$34.80, and that the weight was 12,000 pounds. The defendant contended that the plaintiff should have shown the weight of the damaged goods, and should have been limited to a recovery at the rate of \$5 per 100 pounds on such weight. It also

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contended that the special contract did not constitute a gross valuation of the goods at \$600, but that by it the cargo of household goods and furniture was in effect divided into 120 parts, and a valuation of \$5 placed upon each. The court in referring to the contention said: "Neither the contract itself nor the nature and condition of the goods affords a basis for that contention. There were more than 120 items of property, and it is improbable that they could have been separated into 120 parts of equal weight. There was nothing to identify any particular hundredweight. It would therefore be impossible to know in advance, as might be known in the case of the shipment of animals or sealed packages or goods of a uniform quality or value, what articles of the household goods and furniture were comprised in the separate allotment into parts of the weight of a hundred pounds each. The shipper, therefore, on that view of the contract, would not be entitled in any contingency to recover damages to the full extent of \$5 per hundred pounds, unless all of the goods were damaged or destroyed. The construction claimed in behalf of the appellant would require that the damaged or destroyed property be considered separately, and that the recovery be limited to \$5 per hundred weight of that part of the shipment. It might be claimed in behalf of the plaintiff with equal force that she should be at liberty to pick out an article damaged to the extent of \$5, and have it weighed off with other articles not damaged, and ascertained the total liability of the carrier. Moreover, there is no other valuation stated in the bill of lading, and only one weight, viz., the gross weight, is given. There is no evidence that the shipment was subdivided and then separately weighed. The reasonable construction of the contract is therefore that the shipper accepted for the plaintiff a low freight rate, and in consideration therefor agreed upon its valuation as a means of arriving at a gross valuation. It is to be borne in mind that the bill of lading was prepared by the railroad company, and that it tends to limit its common-law liability, and therefore it is to be strictly construed against it. It evidently was more convenient for the agents of the common carrier to use this stamp which would print on the bill of lading that the valuation was restricted to \$5 per 100 pounds than to figure out the total valuation at that rate, based on the weight, and write the same in. We are of opinion that the stamp, as used, was a mere substitute for writing in the total valuation as thus computed, and that the contract is to be construed as if the bill of lading had stamped on it, instead of the words "Valuation restricted to \$5. per 100 lbs.," the words "Valuation restricted to \$600," which in each instance would have required a computation, and, since the total valuations would vary, would also doubtless require that the valuation be written in, thus requiring more work and consuming more time on the part of the agents of the carrier. Another possible reason for the use of the stamp, estimating the value by the hundred weight, is that the stamp, estimating the value by the hundred pounds weight, is that the column on the bill of lading in

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which the weight is written is headed "Weight. Subject to correction;" and, since the weight had only apparently been estimated and might be increased or reduced, it may have been deemed more practicable to fix the valuation at so much per hundred pounds. That, however, is not indication of an intent to subdivide such a cargo into one hundred pound lots, where it was not so divided when delivered for shipment. We think that it was the intention of the carrier to afford the shipper the benefit of a reduced rate on condition that a special valuation of the cargo be agreed upon by which the liability of the carrier would be limited. It has long been the established rule that it is competent for a common carrier to make such a contract with the shipper. We are of opinion, therefore, that it was not incumbent on the plaintiff to show the weight of the goods damaged or destroyed, and that he was not limited in his right to recover \$5 per hundred weight of that part of the goods weighed separately."

1. Fraud as affecting limitation.

The material provision of the contract in *Gillespie v. Platt* (19 Misc. 43, 42 N. Y. Supp. 876), was as follows: "It is further agreed that this company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants, nor in any case shall this company be held liable or responsible, nor shall any demand be made upon them, beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The plaintiff sues for the loss of a ring valued at \$100. The defendant relies upon the limitation of \$50 expressed in the contract as no value was stated at the time of shipment. To overcome this limitation the plaintiff claimed fraud in the treatment of the property when in the hands of the defendant's agent for delivery. The court in holding that the defendant was liable for the full value of the property said: "The limitation of liability, it is conceded, does not apply in the case of fraud; and if the evidence supports an inference that the carrier or its employees kept the goods instead of delivering them, the company is liable for the full value of the goods, without any limitation. In this case it appears that the ring in question was given by the company to its driver to deliver to the plaintiff and the finding of the justice established that it was not delivered. The driver swears that it was, and is contradicted by two persons. This is, therefore, not merely a question of nondelivery. The goods are traced to the company's agent, and he does not account for them except by saying that he delivered them, which the court finds is not the fact. The proof shows that the bill of delivery, as made out in the office of the company and given to the driver, could be used, by reason of its form, to perpetrate a fraud, and to render its immediate detection by

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the consignee difficult, if not impossible, while affording apparent protection to the driver and company. As we has said, there were three packages to be delivered to the consignee, but only two entries were made on the bill which the consignee was asked to receipt. One of the entries was obscurely worded, so as to read for two packages, while it might be easily mistaken as intending but one. The fact is found that two packages only were delivered at the consignee's house to his servant, and the bill was presented to be receipted only in two places. The two signatures were readily obtained, and the driver departed with a receipt for three packages, thus obtained by a means which readily lent itself to the easy perpetration of a fraud, and offered a temptation to commit it. The limitation of liability in the contract receipt relieved the defendant from liability for nondelivery, but not from an affirmative act of wrongdoing, even if unintentional. It may be assumed that the act of the company in making out the waybill for the driver in the manner described was unintentional; that is, that it was not so made out with the purpose of enabling him to commit a fraud. But the act put it in his power to mislead the consignee into receipting for three packages when only two were delivered, and into believed that only two were to be delivered, and to mislead the company into believing that all the packages had been delivered, thus preventing them from ascertaining the fact of nondelivery and making an immediate investigation so as to prevent loss to the consignee. The act of the company, therefore, in the manner it adopted for the delivery, was an affirmative act, and was wrongful, and takes the case out of the rule of exemption under the special contract."

j. Misfeasance affecting limitation.

In *Magnin v. Dinsmore* (70 N. Y. 410, 26 Am. Rep. 608), the receipt given by the carrier contained the following clause: "If the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adam's Express Co. a sum exceeding fifty dollars for the loss, or detention of, or damage to, the property aforesaid." No statement of value was made or required at the time of shipment. The evidence showed the value of the goods was \$1,491.50. Plaintiff's evidence tended to show that the goods were not delivered to the consignees; and that the box which contained the package shipped was found empty about a year after the shipment, at Gowanus, Long Island. Plaintiff claimed that the defendants (Adam's Express Co.) were guilty of a misfeasance, or of an abandonment of their character as carriers, and were therefore deprived of the benefit of the limitations of the contract, and were liable for the full amount of the loss. The court in holding that the plaintiff was bound by the limitation of the carrier's liability said: "It would be trifling with contracts deliberately made by shippers, and the decisions of our courts, and saying in effect that they could not, by any contract, limit or

Limitation of amount of liability of carrier of goods.—Continued.

restrict their common law liability to hold that by calling ordinary neglect, from which loss ensues, a "misfeasance" or "an abandonment of the character of carriers" the limitation was nullified, and the full common-law liability established. The act which will deprive the carrier of the benefit of a contract for a limited liability fairly made must be an affirmative act of wrong doing, not merely ordinary neglect in the course of the bailment. It need not necessarily be intentional wrong doing, but the mere omission of ordinary care is the safe keeping and carriage of the goods is not misfeasance."

The shipping receipt under consideration in *Rowan v. Wells, Fargo & Co.* (80 App. Div. 31, 80 N. Y. Supp. 226), was, in substance, in the same form as the one taken by the shipper in *Magnin v. Dinsmore*, supra. Following the decision in that case the court held that the trial court erred in refusing to charge, at the defendant's request, that the recovery should, in any event, be limited to the sum of \$50, unless the shipper proves some affirmative act of wrongdoing on defendant's part, and proof of mere ordinary neglect is not sufficient.

The same may be said of *Ghormley v. Dinsmore*, 53 N. Y. Super. Ct. 36.

k. Parol agreement as affecting limitation.

In *Cohen v. Morris European & American Express Co.* (151 App. Div. 672, 136 N. Y. Supp. 489), the plaintiff attempted to destroy the limitation in the shipping receipt by evidence of an alleged prior parol agreement, but the court held that as the transaction was evidenced by a written receipt or contract all previous negotiations were merged therein and the plaintiff was bound by the limitation. The portion of the receipt containing the limitation was as follows: "It consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein." No value was stated in the receipt.

l. Carriage of live stock.

Zimmer v. New York Central & H. R. R. Co. (137 N. Y. 460, 33 N. E. 642), was an action to recover for the loss of a horse, valued at \$5,000, which was killed as the result of a railroad accident. The contract in that case was headed: "Live Stock Contract of release and agreed valuation according to the official classification of the New York Central and Hudson River Railroad." It recited that the company transported live stock

Limitation of amount of liability of carrier of goods.—Continued.

at certain prices "carrier's risk," and at reduced prices, upon certain risks being assumed by the shipper, and upon the condition that the property was valued as stated below. The contract then read: "Now in consideration that said company will transport at said reduced prices, one horse valued at not exceeding \$100 * * * consigned to G. P. Coolidge at Antwerp, N. Y., it is * * * agreed that in the event of the loss, death or injury of the animals, or any of them, from causes which would make the carrier liable, such liability shall not, in any case, exceed an amount to be fixed according to the above valuation." The plaintiff's counsel argued that the clause, limiting the liability of the company, did not refer to an injury, or death, which is occasioned by its negligence as a bailee; but the court held that "the language is far too general in the clause itself to bear him out. The agreement of the company was to transport the horse at a reduced rate, upon the condition that its value should be as stated and we would fail to give adequate effect to the agreement and its consideration, if we should hold that the company had not limited the extent of its liability in all events."

m. Application of Public Service Commission Law § 38.

In *Baum v. Long Island Railroad* (58 Misc. 34, 108 N. Y. Supp. 1113), the defendant's agent gave the plaintiff the usual express receipt containing a clause limiting the company's liability to \$50. The plaintiff's counsel contended that this was rendered void by § 38, ch. 429, p. 911 of the Laws of 1907, known as the "Public Service Commission Law." The part of § 38 relied upon is as follows: "No contract, stipulation or clause in any receipt * * * shall exempt or be held to exempt any common carrier from any liability for loss, damage or injury caused by it to freight or property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such freight or property." The court however said that "a careful examination of this language establishes conclusively that this portion of the section refers solely and conclusively to the carriage of 'freight' and has no relation to the carriage of goods by express." Plaintiff's counsel also contended that defendant could not limit its liability as the section provides that a common carrier cannot exempt itself from liability. But the court held that there was a difference between "exempt" and "limit" and that therefore this point could not be raised. Then again, section 38 of the Public Service Commission Law provides that every common carrier shall be liable for loss, damage, or injury to property carried as baggage up to the full value, but that the value in excess of \$150 must be stated, etc. The court however held that this portion of the section applied to the shipment or carriage of baggage, where the property is carried as baggage, and not to a case like the present one, where the prop-

Limitation of amount of liability of carrier of goods.—Continued.

erty in question was the subject of shipment by express upon a contract entered into with full opportunity for examination and deliberation. The court therefore held that as no value was given at the time the agreement was made the defendant's liability was limited as provided in the receipt to the sum of \$50.

In *Morgan v. Woolverton* (203 N. Y. 52, 96 N. E. 354), the defendant entered into a contract with the plaintiff to take her trunk from the railroad company and deliver it at her home. The contract was evidenced by the defendant giving the plaintiff a receipt for her railroad trunk-check, before she arrived at her destination. The trunk was lost and the defendant attempted to limit its liability by pleading § 38 of the Public Service Commission Law, which reads as follows: "Liability for damage to property in transit. * * * Every common carrier and railroad corporation shall be liable for loss, damage and injury to property carried as baggage up to the full value and regardless of the character thereof, but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of one hundred and fifty dollars and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket." The court held that this section did not apply as it related to property "carried as baggage," and that property which was being moved by express or otherwise apart from and disconnected with the transportation of the person who owns the same, even though it be a trunk, was not "baggage."

n. Interstate Commerce Act, § 20 as affecting limitation.

In *Greenwald v. Barrett* (199 N. Y. 170, 92 N. E. 218), to defeat the limitation of liability sought to be effected by a clause in the express receipt the plaintiffs relied upon a provision contained in the act of Congress commonly known as the Hepburn Act, being an amendment to section 20 of the Interstate Commerce Act, passed June 29, 1906 (34 Statutes at Large, 594). That amendment reads as follows: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he

Limitation of amount of liability of carrier of goods.—Continued.

has under existing law." The clause in the express receipt limiting liability was as follows: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein." The court held that this act of Congress did not forbid an express company from making a contract with a shipper such as that quoted. To quote from the opinion: "The purpose of the provision * * * was to render the initial carrier in the case of interstate transportation over connecting lines liable to the lawful holder of its receipt or bill of lading for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of the hands of the initial carrier or not; and furthermore to prevent interstate carriers from exempting themselves from liability for the loss of property or damage thereto after it had passed into the hands of another carrier to be transported to its destination." The decision of the court in upholding this right of contract between shipper and carrier is supported not only by the decisions of other states (Travis v. Wells, Fargo & Co., 79 N. J. L. 83, 74 Atl. 444; Bernard v. Adams Express Co., 205 Mass. 254, 91 N. E. 325), but by the Supreme Court of the United States (Hart v. Pennsylvania R. R. Co., 112 U. S. 331).

The case of *Vigouroux v. Platt* (62 Misc. 364, 115 N. Y. Supp. 880), had to do with the same section of the Interstate Commerce Act as did the case of *Greenwald v. Barrett*, supra, and it was held that under this Act a common carrier could not limit its liability to \$50 in case of negligence. But as the court in the *Greenwald* case held that this act did not "abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried," the decision in the *Vigouroux* case is rendered valueless.

The same may be said of *Schutte v. Weir* (59 Misc. 438, 111 N. Y. Supp. 240).

o. Carmack amendment to Interstate Commerce Act as affecting limitation.

In *United Lead Co. v. Lehigh Valley Railroad Co.* (156 App. Div. 525, 141 N. Y. Supp. 310), it was held that an agreement that the liability of the carrier, in case of loss, should be fixed or determined according to the rate selected by the shipper, was not in violation of or prohibited by the Carmack amendment of June 29, 1906 (Act June 29, 1906, ch. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]).

*Limitation of amount of liability of carrier of goods.—Continued.**p. Provision of a State Constitution as affecting limitation.*

The plaintiffs in *Barnes v. Long Island Railroad Co.* (115 App. Div. 44, 100 N. Y. Supp. 593, affirmed 191 N. Y. 528, 84 N. E. 1108), delivered 29 colts and fillies to the Adams Express Co. at Lexington, Ky., for shipment to New York under a written contract which provided, among other things: "Twenty horses, consigned to John Miller at Sheepshead Bay, N. Y., for the sum of three hundred and twenty-five dollars and — cents, which charge is fixed by and based upon the value of said animals as declared by the shipper, as hereinafter mentioned. (2) And in consideration of the premises said parties agree that the shipper, before delivering the said animals to said express company, demanded to be advised of the rates to be charged for the carriage of said animals aforesaid, and thereupon was offered by said express company alternative rates proportioned to the value of said animals, such value to be fixed and declared by the shipper, and according to following tariffs and charges. * * * (5) The shipper, in order to avail himself of said alternative rates, and in consideration thereof, being asked by the express company to value said animals, now declares the values hereinafter mentioned to be the true values of said animals so to be shipped, as follows to wit:—twenty horses, value \$75 each." It was also provided that the defendant was to have the same exemptions as the express company. While the shipment was in transit an accident occurred, due to the defendant's negligence, whereby many of the animals were injured. It was urged that the shipping agreement was void under the provisions of § 196 of the constitution of the state of Kentucky. This section provides that "no common carrier shall be permitted to contract for relief against its common-law liability." In holding that the Kentucky Constitution did not invalidate the contract the court said: "Leaving out of consideration the language of the contract in so far as it attempts to make of the express company a forward, rather than a common carrier, under the principle that the law will not permit that to be done by indirection which may not be done directly, is the language of the Kentucky Constitution intended to invalidate such a contract as was concededly made, and permit the plaintiffs to get the benefit of reduced rates of transportation upon a false valuation, and then to charge the defendant with the value of the animals as they prove to be worth after they had been injured through the latter's negligence? We think not, for the common law never sanctioned fraud. The limitation of the Constitution of Kentucky is that 'no common carrier shall be permitted to contract for relief against its common law liability;' that is, it shall not be permitted to contract that it shall not be liable for a breach of those duties and obligations which the common law imposes. But the contract here under consideration does not seek to give the express company, or those for whose benefit the stipulation was made, 'relief against its common-law liability.' It merely seeks to limit the liability to the value as given by

Limitation of amount of liability of carrier of goods.—Continued.

the shipper for the purpose of getting concessions in rates, and this the common law has always sanctioned. Chancellor Kent, who undoubtedly understood the common law, in his Commentaries (2 Kent's Com. 603), lays down the proposition that: 'The common carrier is responsible for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. But the rule is subject to a reasonable qualification; and if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or deludes him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation which he is entitled to, in proportion to the value of the article intrusted to his care and the consequent risk which he incurs, and it tends to lessen the vigilance that the carrier would otherwise bestow.' In the case now before us the contract does not attempt to avoid liability under the common law. It merely seeks to limit its liability to the valuation which the plaintiffs, through their agent fixed as the basis of computing the freight charges, which charges were materially less, because of the valuation of \$75, than they would have been if the value had been placed at \$2,000, each, as the evidence now shows them to have been worth. The express company accepted the animals for shipment under a special acceptance, and the plaintiffs could not avail themselves of the fraudulent valuation for the purpose of getting a concession in rates, and then hold the defendant liable for the higher value when an accident has occurred. The contract provided merely what the common law has recognized as the rule governing common carriers, and it in no wise contravenes the Constitution of Kentucky."

q. Analogous cases.

The following cases are cited in the text case as rendering decisions which greatly weakened the authority of the *Bermel* case, *supra*, which was in effect overruled by the text case. It is for that reason, as well as the fact that they are very similar to the cases treated under this note, that they are here set forth. They are so called "baggage cases," i. e., cases dealing with the limitation of the amount of a carrier's liability for loss of a passenger's baggage.

In *Tewes v. North German Lloyd S. S. Co.* (186 N. Y. 151, 78 N. E. 864, 8 L.R.A.[N.S.] 199, 9 Ann. Cas. 909), it was held that a passenger who had delivered baggage to the defendant for transportation could not recover damages beyond the amount stipulated in the passage ticket, even where the cause of loss was the negligence of the carrier and no reference had been made in the stipulation as to negligence as a cause of loss. The

Limitation of amount of liability of carrier of goods.—Continued.

stipulation was as follows: "It is also agreed that neither the shipowner, nor the passage broker or agent, nor the ship, is in any way liable for loss of or injury to or delay in delivery of luggage or personal effects of the passengers beyond the amount of fifty dollars, unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon."

In *Gardiner v. New York Central & H. R. R. Co.* (201 N. Y. 387, 94 N. E. 876, 34 L.R.A.[N.S.] 826), the passenger sued for loss of baggage. She was the holder of a "fifty-trip family ticket," issued at reduced rates. The ticket contained a clause that "In consideration of the reduced fare at which this ticket is sold,"—then followed a number of conditions, among them the following: "That this company's liability for baggage belonging to each passenger shall not exceed fifty dollars." It was held that this stipulation or condition was effective to limit damages even where the loss occurred through the negligence of the carrier.

In the *Gardiner* case, *supra*, its former decision in the *Bermel* case, *supra* was called to the court's attention, and it was observed in the majority opinion of the court: "The case of *Bermel v. New York, N. H. & H. R. R. Co.* must be regarded either as decided on the special features of that case or else as limiting in its application to a case like the present one by our decision in the *Tewes* case."

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Leavitt v. Jas. F. Scholes Co.

(Court of Appeals, December, 1913.)

**LEAVITT, Appellant, v. JAS. F. SCHOLES CO.,
Respondent.**

(210 N. Y. 107, 103 N. E. 965. *Rev'd* 148 App. Div. 78, 132 N. Y. Supp. 1033.)

1. Executors and Administrators — Suit by — In what capacity.

Although the proper form of action on a cause of action arising out of the administration of the estate is by the personal representative individually, basing his right and title on his letters of administration or letters testamentary, yet he may sue either individually or in his representative capacity, because, no matter in which capacity a recovery is had, it becomes assets of the estate for which he is account-

Note. — When suit by executor or administrator should be in representative and when in individual capacity.

- a. Statutes, 433.
- b. In general, 435.
- c. Suit on negotiable instruments, 438.
- d. Suit for price of goods sold, 439.
- e. Suit on judgment recovered by representative, 441.
- f. Suit on undertaking on appeal from judgment, 442.
- g. Suit in relation to real estate, 442.
- h. Suits founded on tort, 443.

a. Statutes.

The sections of the Code of Civil Procedure affecting this note are 449 and 1814.

§ 449 Code Civil Proc.

Party in interest to sue; executor or administrator may sue alone.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without join-

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able, and it does not concern the defendant, whose liability is individual in any event so that the form of judgment is necessarily the same.

2. Executors and Administrators — Suit by — Costs — Taxed against in individual capacity.

Where a cause of action accrues to the personal representatives of the decedent, as distinguished from a cause of action which accrued to the decedent, whether the personal representative prosecutes the action in his name individually or in his representative capacity, it is to be deemed, for the purpose of the taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he be unsuccessful, the costs may be taxed against him individually without an application to the court.

Appeal from an order of the Appellate Division, First Department.

Action by Lillian B. Leavitt, executrix of Joseph B. Friedlander, deceased, against the Jas. F. Scholes Co. to recover damages for negligence.

Max D. Steuer, of New York City, for plaintiff-appellant.

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

ing with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

§ 1814 Code Civil Proc.

Action, etc., by and against executor or administrator to be brought in representative capacity.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

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Leavitt v. Jas. F. Scholes Co.

Charles W. Gerstenberg, of New York City, for defendant-respondent.

CHASE, J. The plaintiff's testator died May 10, 1901, leaving a will, which was duly probated, and she has been duly appointed sole executrix thereof. After the death of the testator she continued as sole executrix of his will and in his name, and for the benefit of his estate to conduct and manage the business theretofore conducted and managed by him. The defendant is a corporation, and on May 20, 1906, pursuant to an agreement with the plaintiff as such executrix, undertook to remove certain glass from railroad cars in the borough of Brooklyn, city of New York, to the plaintiff's place of business in the borough of Manhattan in said city, but in doing so, pursuant to said agreement with the plaintiff, it is alleged was careless and negligent and broke certain of the glass. This action is brought to recover the plaintiff's damages by reason of such alleged carelessness and negligence. The trial resulted in a verdict for the plaintiff of \$754.80. An appeal from a judgment entered upon said verdict was taken to

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

b. In general.

The representative may enforce in his individual capacity a cause of action accruing after the death of the decedent.

Merritt v. Seaman, 6 N. Y. 168.

Lakin v. Suttin, 132 App. Div. 557, 116 N. Y. Supp. 820.

Brown v. Motteler, 2 N. Y. City Ct. R. 439.

Mercein v. Smith, 2 Hill, 210.

Spies v. Michelsen, 2 App. Div. 226, 37 N. Y. Supp. 720.

And in *Thompson v. Whitmarsh* (100 N. Y. 35, 2 N. E. 273), the court said: "Where an executor or administrator sells on credit the property of the estate, and sues to recover the debt, he, as an individual, is the real party in interest, for the contract is made with him and the promise to pay runs to him, and he is personally accountable for the assets which he has sold. For the same reason the debt does not belong to him in his representative capacity within the intent and meaning of the section of the

the Appellate Division, but the only question presented for review was the ruling of the trial court in refusing to dismiss the complaint because, as is claimed by the defendant, "the action should have been brought by the plaintiff in her individual capacity instead of as executrix." The Appellate Division by a divided court reversed the judgment and granted a new trial. *Leavitt v. Scholes Co.*, 148 App. Div. 78, 132 N. Y. Supp. 1033. An appeal is taken to this court from such order of reversal.

To avoid confusion in the consideration of reported cases involving the estate of a deceased person and the acts and contracts of a person duly appointed an executor or an administrator of the estate of such deceased person, it is necessary to ascertain in each case whether the action was brought *by* or *against* such person individually or in his representative capacity, and also

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

Code referred to (§ 449). That phrase relates to debts which belong to the testator or intestate, and came to the executor or administrator through his representation of the deceased rather than as the result of his own action. * * * Upon new contracts made by the executor or administrator, and never existing in favor of the decedent, but growing out of the former alone, the action is properly brought in the name of the individual."

Where a paper is made payable to the estate of the deceased the action thereon should be brought in the name of the representative of the estate in this individual capacity.

Lyon v. Marshall, 11 Barb. 241.

The plaintiff in *Moss v. Cohen* (158 N. Y. 240, 53 N. E. 8), claimed but a single right of recovery, and this he sought to enforce for the benefit of the estate, as executor. The action was brought in the name of the executor as an individual and as executor. It appeared from the cause of action that but one amount could be recovered and this for the estate whether the recovery was by the plaintiff individually or in his representative capacity. The court in holding that there was not an improper joinder of causes of action, said: "We think it is quite obvious that there is no improper joinder of causes of action. The complaint stated but one cause of action, which is to recover six thousand dollars delivered

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whether the court in each case is considering a permissible or essential form of action or course of procedure.

In *Schutz v. Morette*, 146 N. Y. 137, 140, 40 N. E. 780. this court, considering an action brought on an account *against* an executor as such, say: "When the account relates to transactions between the executor or administrator and another party, upon claims not existing at the death of the decedent, although they grow out of matters connected with administration, the action lies only against the executor or administrator personally. In the one case the judgment is *de bonis testatoris*, and in the other *de bonis propriis*. *Reynolds v. Reynolds*, 3 Wend. 244; *Gillet v. Hutchinson's Adm'rs*, 24 Wend. 184."

This court, again referring to contracts by executors and administrators in *O'Brien v. Jackson*, 167 N. Y. 31, 33, 60 N. E. 238, 239, say: "The general rule is well settled in this state

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

by the executors to the original defendants, and for which they gave a bond to secure its proper application under the provisions of the will. That the plaintiff entitled the action as by himself individually and as surviving executor, in no way discloses a misjoinder of causes of action. There is no pretense nor allegation that the plaintiff claimed more than a single right of recovery, and that he sought to enforce as executor and for the benefit of the estate he represents. Moreover the bond ran to the executrix and executors of the state, and to them and each of them individually. * * * Whether he recovers in his own name, or as representative of the estate, he can recover only one amount, and the recovery will be for the benefit of the estate to which the money belongs."

Hone v. De Peyster (106 N. Y. 645, 13 N. E. 778), was an action arising out of transactions between testator and another. The court held that the action should be brought by the executor in his representative and not in his individual capacity.

Suit brought by an executor or administrator on a contract made with decedent must be instituted by the representative in his official capacity as executor or administrator.

Patchen v. Wilson, 4 Hill, 57.

The court in *Merritt v. Seaman* (6 N. Y. 168), held that a suit on a

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that executors or trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate and thus create a liability not founded upon the contract or obligation of the testator." In that case the reason for the rule and an exception to it are stated in language quoted from *Ferrin v. Myrick*, 41 N. Y. 315, as follows: "While as between the executor and the person with whom he contracts the latter may rely on the contract, the beneficiaries are not concluded by the executor's act, but the propriety of the charge and the liability of the estate therefor must be determined in the accounting of the executor. In an action at law against the executor, the legatees and persons interested in the estate have no opportunity to be heard. To the general rule there are exceptions, and an equitable action can be maintained against

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

note made payable to "the order of C. H. Merritt, Esq. Ex'r of est. of John Sampson" could be brought by the executor either in his representative or individual capacity.

Where a surrogate's decree has directed the payment, by the administratrix of an estate, of a certain sum as the interest of the heirs at law and next of kin, and it is subsequently discovered that there are others interested in the estate, so that an action to recover the over payment of certain interests is necessary, such action must be maintained by the administratrix or her assignee in the representative capacity.

Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 N. Y. Supp. 205.

Where an administrator loans money, he cannot bring an action in his representative capacity to recover same.

Ketchum v. Morrell, 2 N. Y. Leg. Obs. 58.

c. Suit on negotiable instruments.

An executor may sue individually or in his representative capacity to recover on a note given to him for a debt due to his testator.

Merritt v. Seaman, 6 N. Y. 168.

In *Bingham v. Marine National Bank* (112 N. Y. 661, 19 N. E. 416), it appeared that the administrators of an estate deposited money belong-

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the estate on behalf of a creditor in case of the fraud or insolvency of the executor, or when he is authorized to make an expenditure for the protection of the trust estate, and he has no trust fund for the purpose. In the latter case, if unwilling to make himself personally liable, he may charge the trust estate in favor of any person who will make the expenditure. Charges against the trust estate in such cases can be enforced only in an equitable action brought for the purpose. To that action the beneficiaries and cestuis que trust are necessary parties. The trust estate cannot be depleted or swept away except in an action which they may defend.

Where a cause of action accrues after the death of a decedent and in the conduct of an estate and a recovery, if had, must be accounted for by the executor or administrator and an action is brought thereon by such executor or administrator, the reason

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

ing to the estate in the defendant bank and received therefor a certificate of deposit. The court held that suit upon the certificate could be brought by the administrators in their individual capacity.

The plaintiff in *Van Buren v. First National Bank* (53 App. Div. 80, 65 N. Y. Supp. 703), after depositing bonds belonging to the estate with the defendant bank, resigned as executor. The surrogate entered a decree discharging him on payment of the amount of the assets of the estate. He then brought action as an individual to recover the bonds from the bank. The bank defended on the ground that the bonds belonged to the estate, but the court held that the plaintiff could recover as he would have to realize on the bonds to pay the decree, and that the money realized from their sale would go to the new representative of the estate in place of the bonds.

Barlow v. Myers (24 Hun, 286), was an action by an executor in his individual capacity to recover on a promissory note which had been indorsed in blank and deposited by testator for collection. The court held that the action was properly brought.

d. Suit for price of goods sold.

The court in *Gross v. Gross* (26 Misc. 385, 56 N. Y. Supp. 219), in

for enforcing the rule above stated in actions *against* an executor or administrator does not apply. We quote with approval from the dissenting opinion of Justice Laughlin of the Appellate Division in this case (148 App. Div. 78, 132 N. Y. Supp. 1033): "Although the proper form of action on a cause of action arising out of the administration of the estate is by the personal representative individually, basing his right and title on his letters of administration or letters testamentary, yet it is well sustained by authority that, with the exceptions already stated, he may sue either individually or in his representative capacity, and this for the reason that no matter in which capacity a recovery is had the recovery becomes assets of the estate for which he is accountable, and it does not concern the defendant, whose liability is individual in any event so that the form of judgment is necessarily the same, and the same defenses and

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

referring to causes of action arising after the death of the testator, held that the form of action was not affected by §§ 449 and 1814 of the Code of Civil Procedure. The action in that case was brought by the executor in his representative capacity to recover for goods belonging to the estate but sold by him after testator's death. The court in holding that the action could be maintained, said: "The defendants urge that the sale upon which the suit is based having been made after the death of the testator, the plaintiff cannot, as executrix, maintain an action against them, and that their liability * * * can be established only in an action instituted by them personally; in other words, that the debt does not belong to them in their representative capacity. While it would have been better pleading to have declared upon the plaintiff's individual right, we cannot under the authorities * * * reject the complaint. Under the common law, where the cause of action accrued after the death of the testator, the plaintiff could at his option, declare either in his own name or in his representative character; the test being, will the recovery enure to the estate? The common law rule was changed by the sections of the Code which provide that an action by an executor or administrator upon a cause of action belonging to him in his representative capacity, must be brought by him in that capacity, and that all actions must be prosecuted in the name of the real party in interest (Code of Civil Proc. §§ 449, 1814). * * * The change resulting from those sections does not affect

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remedies are available to the defendant whose liability will be discharged by the satisfaction of the recovery no matter in which form it may be had. *Moss v. Cohen*, 158 N. Y. 240 [53 N. E. 8]; *Dunphy v. Callahan*, 126 App. Div. 11 [110 N. Y. Supp. 179], affirmed [56 N. Y. Supp. 219]; 194 N. Y. 587 [88 N. E. 1118]; *Gross v. Gross*, 26 Misc. Rep. 385; *Kane v. Paul*, 14 Pet. 33 [10 L. ed. 341]; *Mercein v. Smith* [2 Hill, 210], *supra*; *Merritt v. Seaman* [6 Barb. 330], *supra*; *Patterson v. Patterson* [59 N. Y. 574, 17 Am. Rep. 384], *supra*; *Bingham v. Marine Nat. Bank* [41 Hun, 377], *supra*; *Buckland v. Gallup* [105 N. Y. 453, 11 N. E. 843], *supra*; *Spies v. Michelsen*, 2 App. Div. 226, 37 N. Y. Supp. 720; *Van Buren v. First Nat. Bank*, 53 App. Div. 80 [65 N. Y. Supp. 703], affirmed 169 N. Y. 610 [62 N. E. 1101]. And see *Steele v. Leopold*, 135 App. Div. 247 [120 N. Y. Supp. 569], affirmed 201 N. Y. 518 [94

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the form of action to be adopted upon demands created after the decease of a testator."

c. Suit on judgment recovered by representative.

In *Willets v. Haines* (96 App. Div. 5, 88 N. Y. Supp. 1018), the plaintiffs sued and recovered in their representative capacity on a judgment which they had taken in the same capacity; and this although the word "as" was omitted in the title of the action between the names of the plaintiffs and the words descriptive of their representative capacity.

Nichols v. Smith (7 Hun, 580), was an action brought by administrators in their individual capacity to recover on a judgment taken by them in another state in their representative capacity. The court in holding that the plaintiffs could recover, said: "The title to the judgment was absolutely in the plaintiffs; and when they take proceedings in our courts to collect the judgment it is in the nature of a chose in action, and may be prosecuted here in their individual names. The judgment is to be used on the trial to show and establish their title and the amount they are entitled to recover. There is no substantial reason, why a recovery may not be had in this case in the individual names of plaintiffs, as well as in cases arising upon promissory notes and other choses in action."

N. E. 1099]; *Knox v. Met. El. R. Co.*, 58 Hun, 517 [12 N. Y. Supp. 848], affirmed 128 N. Y. 625 [28 N. E. 485].” See also, *Bingham v. Marine Nat. Bank of N. Y.*, 112 N. Y. 661, 19 N. E. 416; *Lakin v. Sutton*, 132 App. Div. 557, 116 N. Y. Supp. 820; *Thompson v. Whitmarsh*, 100 N. Y. 35, 2 N. E. 273; *Van Ness v. Kenyon*, 208 N. Y. 228, 101 N. E. 881.

Where a cause of action accrues to the personal representatives of the decedent, as distinguished from a cause of action which accrued to the decedent, whether the personal representative prosecutes the action in his name individually or in his representative capacity, it is to be deemed, for the purpose of the taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he be unsuccessful.

When suit by executor or administrator should be in representative and when in individual capacity.—Continued.

f. Suit on undertaking on appeal from judgment.

Morris v. Hanken (40 App. Div. 129, 57 N. Y. Supp. 712), was an action brought by executors in their individual capacity to recover on an undertaking on appeal given upon a judgment recovered by them in their representative capacity. The court, in holding that plaintiffs could recover in their individual capacity, said: “Though the undertaking was given upon a judgment recovered by the plaintiff as executors, still it could have been enforced by the plaintiffs in their individual capacity; * * * and it was neither necessary to allege nor to prove the probate of the will, and the issue of letters testamentary, as the defendants were concluded on that question by the recovery of the first judgment, and their execution of the undertaking on appeal from it.”

g. Suit in relation to real estate.

The plaintiff in *Loew v. Christ* (13 App. Div. 624, 42 N. Y. Supp. 963), who was an administrator, made a contract in regard to real estate of his intestate with which he had officially no concern. The court in holding that he could bring suit on the contract in his individual capacity said: “The case of *Thompson v. Whitmarsh* (100 N. Y. 35, 2 N. E. 273), holds distinctly that when an administrator has made a contract in regard to the property of the estate he may sue in his own name individually to enforce it. Much more is this the case when, as here, he has contracted in regard to the real estate of his intestate, with which he has officially no concern.

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the costs may be taxed against him individually without an application to the court. *Dunphy v. Callahan*, 126 App. Div. 11, 110 N. Y. Supp. 179, affirmed on the prevailing opinion in the Appellate Division, 194 N. Y. 587, 88 N. E. 1118.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in both courts.

CULLEN, C. J., and WERNER, HISCOCK, COLLIN, CUDDEBACK, and HOGAN, J., concur.

Order reversed, etc.

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In that case the contract affects him personally only, and he can sue on it only in his individual capacity."

The plaintiff in *Kingsland v. Ryckman* (5 Daly 13), having leased in his own name property of the estate which he was representing as executor, brought suit in his individual capacity to recover rent under the lease. The court held that the action could be maintained.

h. Suits founded on tort.

The plaintiff in *Patchen v. Wilson* (4 Hill, 57), brought suit in his individual capacity to recover for goods and chattels tortiously or wrongfully converted. The court held that the action could be maintained.

Buckland v. Gallup (105 N. Y. 453, 11 N. E. 843), was an action brought by the plaintiff in his representative capacity, he having been appointed administrator *de bonis non* with the will annexed of Warren Buckland. The executrix who was also the beneficiary under the will sold the real property before her death and took in payment two bonds and mortgages, one of which she sold, and the proceeds together with the other bond and mortgage she loaned to the defendant. The bonds and mortgages, and the note given by the defendant for the loan, were all payable by their terms to the executrix personally and individually. The action was to recover the bond and mortgage and money loaned to the defendant. The court in holding that the action could not be maintained said: "The special term

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regarded the question as controlled by section 1814 of the Code of Civil Procedure, which declares that an action by an executor or administrator 'upon a cause of action belonging to him in his representative capacity * * * must be brought by him in his representative capacity; while the general term looking at the cause of action as one arising out of a transaction which occurred after the testator's death, held that it did not belong to the plaintiff in his representative capacity within the meaning of that section. This difference of opinion necessarily leads to an inquiry whether the cause of action upon which the plaintiff sues is, within the meaning of the Code, one belonging to him in his representative capacity.' That capacity was created by statute to carry into effect the wishes of the decedent, and by virtue of it an executor takes as of the time of the death of the testator, and as it were, from his hands, his personal property, so that there is no interval of time when it is not the subject of ownership, up to the time of his death, and from that moment by the person named, not as an individual, but as a representative. The statute characterizes the property received as assets, requires it to be inventoried, and for any increase, the executor is to account. * * * He and his sureties are liable for the full value of all such property of the deceased, received by the executor and not duly administered, and if the cause of action accrued in the lifetime of the testator, any suit respecting it must be in the name of the executor as such. He then sues in the right of the testator, and can then bring such actions only as the testator himself might have maintained. On the other hand, if an injury to the property, or its conversion happens after the death of the decedent, although before letters are actually issued, or if a contract is made with an executor or an administrator personally, in regard to the effects or money belonging to the decedent, received by a third person after the death, the administrator might sue in his own name, and if in any of these cases he may also sue in his representative character, he is not required to do so. * * * The provisions of section 1814 imply that a person, while executor, may have causes of action of more than one kind, for it declares that those which belong to him in 'a representative capacity' shall be prosecuted in that capacity. They are thus contrasted with all others, and as clearly distinguished as if one class devolved on A and the others on B. So in construing the section, it has been held that the phrase 'representative capacity' includes only those causes of action which accrued during the lifetime of the decedent."

Valentine v. Jackson (9 Wend. 302), was an action for conversion of goods belonging to an estate. The goods were taken prior to the granting of letters of administration to the plaintiff. The court, in holding that plaintiff could sue in his individual capacity, said: "The administrator derives his authority to take the possession and control of the goods of the

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intestate from the letters of administration. Before this is granted, he has no right to intermeddle with the estate; but when granted, it relates back to the period of the death of the intestate. By means of this relation, which by operation of law vests the property and consequently the possession of the goods in the administrator, he may maintain an action for an injury to them after the death of the intestate, the same as an executor, with only this difference; the latter may commence the suit immediately upon the injury being done, and before probate; the former cannot until letters of administration are granted. The right of the one accrues immediately upon the death of the testator, and exists in fact when the wrong is done the other accrues upon the grant of the letters of administration, and exists when the wrong is done only by relation. Both rights are equally operative, and the action for an injury to or destruction of the property of the deceased, is founded upon the possession, actual or constructive, of the individual executor or administrator, and consequently may be maintained in his own name, without declaring in his representative character."

(*Court of Appeals, June, 1913.*)

BARCLAY, Appellant, v. BARRIE, Respondent.

(209 N. Y. 40, 102 N. E. 602. Rev'g 154 App. Div. 925, 139 N. Y. Supp. 81.)

1. Partnership — Duty of partner.

In the absence of express agreement to the contrary, a partner is impliedly bound reasonably to devote himself to the advancement of the copartnership.

2. Partnership — Dissolution — Permanent incapacity of partner — Equity.

Courts of equity have power to decree dissolution of a copartnership because of permanent incapacity of a partner which materially affects his ability to discharge the duties imposed by his partnership relation and contract.

Note. — Incapacity of partner as ground for dissolution of partnership.

An exhaustive search has disclosed no other case in this state where suit has been brought to procure a dissolution of a partnership on the ground of the incapacity, either mental or physical, of one of the partners. The text case therefore is a valuable addition to the law of partnerships as regards the ground or cause for dissolution.

When the text case was in the Appellate Division, Mr. Justice Ingraham, in a dissenting opinion, said: "Where it appears that one partner has been stricken with a disease which practically makes it impossible for him to perform the duties assumed by him by his copartnership agreement, such disability is not of a temporary nature, but is permanent in its character, and the remaining partner is entitled to apply to a court of equity for a dissolution of the copartnership. Whether we call such a disability permanent or temporary, if it appears by substantial evidence at the time of the trial that the disability was such as to prevent the disabled partner from rendering any substantial service to the firm during

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3. Partnership — Dissolution — Permanent incapacity of partner — Definition.

"Permanent" incapacity as a ground for dissolution does not and should not mean incurable and perpetual disability during the life of the partner, but it means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote, which has continued or is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect and obstruct the purpose of the partnership.

4. Partnership — Permanent incapacity of partner — As ground for dissolution.

When a partner has been totally incapacitated from attending to his duties for three years and eleven months out of a partnership period of four years and eleven months, with no assurances that he will recover before the expiration of the unexpired balance of eleven months, the incapacity has been of a permanent and not a temporary or fleeting character, and of a substantial and not inconsequential nature, and the purpose of his partner in joining with him has been materially and essentially defeated, so that the remaining partner is entitled as matter of law to a dissolution of the partnership.

***Incapacity of partner as ground for dissolution of partnership.—
Continued.***

the period for which the copartnership was to exist, a court of equity is thereby justified in dissolving the copartnership."

Judge Laughlin in a concurring opinion in the Appellate Division, when the text case was in that court on a former appeal, said: "There is nothing in the nature of a copartnership by which one partner takes the other, as to mentality or health, for better or for worse. It is but an ordinary contract in which the public have no interest, and if the condition of one partner, at the time the court is called upon to decide the question, be such that he is incapacitated, either mentally or physically, from performing duties of a substantial nature, which it was contemplated would be performed by him, and it appears that he will not recover from such incapacity within a reasonable time in view of all the circumstances, I see no reason on principle why the copartnership should not be dissolved if the competent partner be unwilling to continue it longer.

It may be well to note that Judge Patterson in *Friedburgher v. Jaberg* (20 Abb. N. C. 279, 11 N. Y. S. R. 718), said that the prevailing opinion

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5. Partnership — Dissolution — Proof.

In an action by a partner against his copartner to procure the dissolution of the partnership on the ground of defendant's incapacity, the burden rests upon the plaintiff to show that the defendant had become incapacitated by reason of sickness from attending to the partnership affairs, and it is immaterial that the defendant, after his incapacity, was excluded from participation in these affairs.

6. Partnership — Judgment of dissolution — Date.

Under ordinary circumstances dissolution of a partnership will be adjudged as of the date when the judgment was granted, but when such adjudication will be of no benefit whatever, the court will adjudge such relief as of an earlier date.

Appeal from a judgment of the Appellate Division, First Department.

Action by Reginald G. Barclay against Alexander Barrie to procure a dissolution of their partnership.

Charles F. Brown, of New York City, for plaintiff-appellant.

*Incapacity of partner as ground for dissolution of partnership.—
Continued.*

is that insanity gives "a good and sufficient cause for a court of equity to decree a dissolution." To this the judge cited "Story on Part., § 295 and note; Collyer on Part., Vol. 1, § 101." In the Friedburger case the court held that insanity, not declared by inquisition, did not dissolve a partnership, and that therefore the competent partner could not make an assignment without the assent of the insane partner. The court said further that, "whether a dissolution shall be decreed must rest in the sound judgment of the court, expressed after hearing all the facts, and in view of the disability being temporary or permanent."

Justice Story in his work on Partnership (§ 291) says: "A partnership may be dissolved by the decree of a court of Equity on account of the inability or incapacity of one partner to perform his obligations and duties, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership. This inability or incapacity may arise in various ways; and whenever its direct tendency is either necessarily to frustrate, or essentially to obstruct, or diminish, the

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Edward B. Hill, of New York City, for defendant-respondent.

HISCOCK, J. This action was brought to procure a dissolution of partnership between the plaintiff and defendant because, as alleged by the former, the latter had become incapacitated by reason of sickness from discharging his duties as such copartner.

The parties had been copartners in the business of manufacturing and selling under a succession of partnerships from the year 1873 until on or about January 1, 1904. On said last date articles were again entered into which were from time to time, extended, and on or about February 7, 1908, an agreement was made extending the partnership to January 1, 1913. The partnership agreement, thus extended and involved in this action, provided for the use of certain trade-marks belonging to the plaintiff and to the estate of a deceased brother, for a compensation somewhat in excess of 50 per cent. of the net profits, for a division of the balance of such profits between the parties hereto on a somewhat larger percentage to defendant than to

*Incapacity of partner as ground for dissolution of partnership.—
Continued.*

objects of the partnership, it would seem clear upon principle, that it ought to furnish a complete ground for a dissolution by a court of justice; for the further continuation of the partnership must be productive of serious inconveniences and injury to the other partners, and may end in their irremediable ruin, or the utter prostration of the enterprise."

In speaking of insanity as a cause for decreeing dissolution, Parsons on Contracts (§ 361) says: "One qualification belongs to this cause, it is that of degree. Of course, delirium from fever, or from a blow on the head, lasting a short time and passing entirely away, would not be sufficient cause. But, while there can be no specific rule as to the measure of insanity which will determine its sufficiency as a cause for the dissolution of partnership, equity would decide such a question by a reference to the universal standard which determines all questions of this kind: Is the insanity such, in cause, character, and degree, as to incapacitate the partner from a reasonable performance of his duty now, and to take away all reasonable hope of his so performing it within a reasonable time?"

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plaintiff, and for a contribution of capital of which, as a matter of fact, the defendant contributed about \$130,000 and the plaintiff about \$110,000. Said agreement also contained the following provision: "At all times during the continuance of said partnership, each partner shall give reasonable time, attention and attendance to, and use reasonable endeavors in the business of said copartnership, and shall, with reasonable skill and power, exert himself for the joint interest, profit and advantage of said copartnership and shall truly and energetically, with the joint stock and increase of said business, sell, deal and merchandise. The alleged breach of any of the provisions of this section vii of these articles by either party hereto shall not give to the other party hereto any right to damages or to any relief whatsoever, until thirty days after written notice by such party specifying in detail the acts or omissions deemed by such other party to constitute such breach and stating that for any such breach accruing after such thirty days, damages will be demanded." It was provided, in substance, by supplementary agreement that plaintiff at his option should not be required to devote himself actively to the conduct of the business, in which event the defendant should receive a small additional percentage of the profits; also, that "in the event of the termination of said copartnership by limitation, agreement, death or otherwise, the share of the said partners shall be paid to them or to their respective representatives within five (5) years of said termination, but in installments of not less than twenty-five thousand (25,000) dollars in each and every year succeeding such termination, with interest at and after the rate of six (6) per centum."

May 10, 1908, defendant was afflicted with a stroke of paralysis caused by a hemorrhage in the left side of his brain, and on the second and last trial of this action, occurring in March, 1912, the court found: That as the result of such ailment the defendant had "temporary paralysis of the right side of his body and a certain difficulty of speech, and thereby became incapacitated from devoting any time, attention, or attendance to the business of the copartnership, or using reasonable en-

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deavors in the business of the copartnership or exerting himself for the joint interest, profit, and advantage of the copartnership with reasonable skill or power; and from in any way selling, dealing, or merchandising with the joint stock and increase of said business. That the defendant has not recovered from the effect of said stroke of paralysis and the *aforesaid incapacity resulting* therefrom, but his condition will so improve that prior to the time limited for the existence of the copartnership he will make a practical recovery of his health. There has been a steady, decided progressive improvement in all the difficulties in which the defendant's affliction manifested itself. * * * The defendant's mentality has never been involved, and he has not shown any signs of any mental deterioration. Defendant was mentally perfectly normal and competent. At the time of the trial the defendant could walk without any assistance whatsoever, and write with his right hand, and express his thoughts on any topic intelligently, and could carry on any conversation without difficulty." Also that since the date of his stroke of paralysis defendant has not attended to the business of the partnership, or given any time, attention, or attendance thereto, and said business has been wholly conducted and managed by the plaintiff.

On or about March 1, 1909, plaintiff sent to the defendant a letter in which, in substance, he called to the attention of the latter his failure to perform his obligations and duties under the articles of copartnership, and notified him that such omissions were breaches of said contract, and that "at the expiration of thirty days after the receipt by you of this notice I shall consider the said firm to be terminated and shall proceed to liquidate the business of the same in accordance with article xvi of the Articles of Copartnership." In addition, on or about April 1, 1909, plaintiff so changed the partnership bank accounts that the funds therein could not be drawn on any checks signed by the defendant, and then commenced this action.

After being copartners for many years in the manufacture and sale of various articles under a succession of agreements, in February, 1908, the parties to this action entered into a

new agreement of copartnership, which was to extend from said date to January 1, 1913. In addition to contributing substantial sums of money as capital, each partner, as an original agreement, expressly undertook reasonably to devote his time and attention to the partnership affairs, but by further provision plaintiff had the right at his option to withhold his time and attention, and in which event defendant was to receive a small additional percentage of the profits. In May, 1908, the defendant was stricken with paralysis, and thereby was concededly disabled from discharging his duties as copartner for a considerable period of time, the full extent thereof being a subject of dispute. In March, 1909, plaintiff, claiming to act in accordance with the provisions of the partnership agreement already quoted, served a notice which, after charging defendant with failure to fulfill his partnership obligations notified him that at the expiration of 30 days the former would regard the partnership terminated in accordance with the provisions of the copartnership agreement, and about April 2, 1909, he commenced this action for a dissolution of such copartnership. He based and prosecuted his action on the twofold theory: First, that he was entitled to a dissolution under general principles of equity because of the incapacity of his partner; and, second, that he was entitled to such dissolution under the provisions of the partnership agreement because of the breach by defendant of his express obligation as set forth in said agreement.

I agree with the counsel for the respondent that the express agreement of the defendant reasonably to apply his time and attention to the management of the affairs of the copartnership does not materially strengthen the plaintiff's case, for undoubtedly, in the absence of express agreement to the contrary, a partner is impliedly bound thus reasonably to devote himself to the advancement of the copartnership of which he has become a member. And, further, I shall not consider plaintiff's right, if any, to relief under the express provisions of the partnership agreement on the theory of a breach of defendant's obligations therein set forth, simply stating, as all that is necessary, that in my opinion those provisions are limited in their application,

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and do not exclude the plaintiff from a right to relief on general principles of equity. Thus the discussion will be limited to the question whether he was entitled to relief under those principles.

Inasmuch as defendant's physical condition is the basic fact in the discussion, it becomes necessary to consider at some length the findings on that subject. The trial court found, amongst other things, that as a result of the stroke of paralysis, May 10, 1908, he "became incapacitated from devoting any time, attention, or attendance to the business of the copartnership, or using reasonable endeavors in the business of the copartnership or exerting himself for the joint interest, profit, and advantage of copartnership; * * * That the defendant has not recovered (speaking as of the time of the trial in March, 1912) from the effects of said stroke of paralysis, and the *aforesaid incapacity resulting therefrom*;" that there had been a steady, progressive improvement in all defendant's difficulties; that his mentality had not been involved; and that at the time of the trial he "walked without any assistance whatever, and wrote with his right hand, and expressed his thoughts on any topic intelligently and could carry on any conversation without difficulty;" that his condition would "continue to improve, ending in practical recovery within the time limited for the existence of the copartnership."

In my opinion the fair construction of these findings as a whole is that defendant became and continued wholly incapacitated for the discharge of his duties as copartner from May 10, 1908, until March, 1912, and that the most which could be expected in the future was that he would make "a practical recovery within the time limited for the existence of the copartnership," namely, that sometime before January 1, 1913.

I do not regard the explicit finding that the defendant at the time of the trial was still suffering from complete incapacity caused by his stroke of paralysis as at all overcame by the very general and indefinite findings that he had so far recovered that he could perform certain acts. It cannot be fairly inferred that a person has recovered from a total incapacity to transact business because of the statement that he may do various things

mentioned when there is no further information as to the distance he could walk, the amount of writing he could do, and the length of time he could converse. An established incapacity to endure the general strain and constant activity incidental to the conduct of a large business is not shown to be cured or avoided by such findings as those, and that the latter do not fairly bear the construction sought to be imposed upon them by the learned counsel for the respondent of a recovery already attained is evidenced by the finding that the defendant would make a "practical recovery" sometime during the following nine months.

It also seems to me that the construction of these findings is very materially illuminated by the facts that the defendant did not appear on either of the two trials, that sometime before the last one he traveled to another state, whither his physicians were called for the purpose of examining him, and that an attempt on the part of the plaintiff to procure a physical examination of him was opposed and defeated by his counsel. It would seem that if the defendant had sufficiently recovered to withstand the strain of active business, there would have been no better way of establishing such fact than by his appearance on the trial.

The principles of law which are applicable to such a situation, as a basis for dissolution of the partnership, though not of frequent application, are, as it seems to me, extremely simple and plain.

As has already been stated, independent of express provision a partner impliedly undertakes to advance the success of the copartnership by devoting to it, within reasonable limits, his time, efforts, and ability. His copartners are entitled to this contribution, and if for any reason he fails to fulfil his duties, they are thereby deprived, in greater or less degree, according to the extent of his failure, of the benefits of the contract which they have made, and of the fruits thereof to which they are legitimately entitled. With entire justice, therefore, the principle has been well established that the courts of equity have power to decree dissolution of a copartnership because of perma-

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ment incapacity of a partner which materially affects his ability to discharge the duties imposed by his partnership relation and contract. Parsons on Partnership (3d Ed.) pp. 503, 504; Story on Partnership (6th Ed.) §§ 291-294; Lindley on Partnership (3d Ed.) vol. 1, pp. 235, etc.; Gow on Partnership (3d Ed.) c. 5, § 1, pp. 221, 222; Whitwell v. Arthur, 35 Beav. 140; Friedburgher v. Jaberg, 20 Abb. N. C. 279, 281; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L.R.A. 440, 15 Am. St. Rep. 112; Jones v. Lloyd, L. R. (18 Eq.) 265; Jones v. Noy, 2 M. & K. 125.

And in elucidation of the general principle thus stated the cases and text-writers, as well as common sense, make it apparent that "permanent" incapacity as a ground for dissolution does not and should not mean incurable and perpetual disability during the life of the partner. It rather means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote, which has continued or is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect and obstruct the purpose of the partnership.

Story says (section 297): "It is not the mere fact of the existence of such insanity, infirmity, or other disability supervening that will justify the court in the application of such an extraordinary remedy (dissolution). But it must be of such a character as amounts to a permanent or confined disqualification to perform the duties of the partnership. If the insanity or other disability be of a temporary or fugitive nature; if it be merely an occasional malady or accidental illness; * * * if there be a fair prospect of a recovery within a reasonable time—then and in such cases there is no fit ground for a court of equity to decree a dissolution, for every partnership must be presumed to be entered into subject to the common incident of life, such as temporary illness, infirmity, or insanity."

In Raymond v. Vaughn, *supra*, it is said: "While curable, temporary insanity will be sufficient, upon any inquisition, to sustain an adjudication of insanity, * * * it will not authorize a court of chancery to decree a dissolution of a partner-

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ship if the malady be temporary, only, with a fair prospect of recovery within a reasonable time. Story on Partnership, § 297. * * * Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to determine the partnership and apply its assets unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation."

In *Jones v. Lloyd*, supra, it was said by Sir George Jessel: "I quite agree with what has been said on the part of the defendant that you must have an allegation of permanent insanity (as a ground for dissolution)—that is, you must have an allegation of insanity, not merely of a temporary character—for that is the meaning of the rule, and not merely insanity from which it is likely or reasonably possible that a man may recover."

Within these principles I think that the plaintiff, on the facts as now found, established his right as matter of law to a dissolution of the partnership. Many times the meaning and effect of such descriptive terms as "substantial" and "reasonable," as found in a rule of action, is to be determined by a jury, but on the other hand, it sometimes happens that a given set of facts is so decisive that their significance is not subject to diverse inferences, and does not present a question of fact, and that I think is the present case. It would seem that there ought to be no doubt or difference of opinion concerning the proposition that when a partner has been totally incapacitated from attending to his duties for 3 years and 11 months out of a partnership period of four years and 11 months, with no assurances that he will recover before the expiration of the unexpired balance of 11 months, the incapacity has been of a permanent and not of a temporary or fleeting character, and of a substantial and not inconsequential nature, and that the purpose of his partners in joining him with them has been materially and essentially defeated.

Two special reasons are urged why the rule of dissolution should not be applied to the facts of this case. In the first place, it is said that inasmuch as defendant undertook largely to dis-

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charge the ordinary duties of plaintiff as copartner for a small extra percentage of profits, the exactions of the partnership business could not have been great or material enough to warrant a dissolution. The fact that the plaintiff's agreement with defendant entitled the former to have the latter do his work is an added argument concerning the disadvantages which flowed to him from defendant's incapacity, and it can hardly be assumed that the utter inability of a partner to discharge his duties to the copartnership is not a matter of substantial importance.

In the second place, it is said and the court, in substance, has so found that after April, 1909, plaintiff maintained the position that he would not permit the defendant to resume his place as a partner, although the latter desired so to do. The only evidence on this subject relates to the plaintiff's insistence that the partnership should be dissolved because of defendant's sickness, and his arrangement of the firm bank accounts so that the latter could not draw therefrom. There is nothing in these facts which constitutes a defense to this action. Defendant is not required to establish as a matter of defense that plaintiff excluded him from participation in the partnership affairs. The burden rests upon the plaintiff to show that the defendant had become incapacitated by reason of sickness from attending to these affairs. If he establishes this proposition, it was defendant's incapacity and not plaintiff's conduct which kept the former from attending to his duties. If plaintiff does not establish this proposition, his action fails independent of any other consideration.

Having thus reached the conclusion that plaintiff on the facts as found was entitled to a dissolution of the copartnership, the question still remains as of what date such dissolution should be adjudged. In fact this at present is the only question of practical importance; for, the partnership agreement having now expired by its own limitations a judgment of dissolution is of no importance unless it relates to a date prior to such expiration. It may be conceded, as argued by the respondent, that under ordinary circumstances dissolution will be adjudged as of the date when the judgment was granted, but beyond question the court may for sufficient reason adjudge such relief as of an

earlier date. *Durbin v. Barber & Barney*, 14 Ohio, 311; *Dumont v. Ruepprecht*, 38 Ala. 175; *Fogg, etc., v. Johnston*, 27 Ala. 432, 62 Am. Dec. 771; *Von Togen v. Roberts*, 2 Pears. (Pa.) 137; *Essel v. Haywood*, 30 Beav. 158. I have no doubt that if on a new trial the court should find that plaintiff was entitled to a dissolution within the principles approved by us, it will have the power to adjudge such dissolution as of an earlier date when he became entitled to such relief, if to it the equities seem to warrant so doing. Plaintiff waited nearly 11 months after the commencement of the defendant's sickness before beginning this action and thereby insisting that the incapacity was permanent, and that he was entitled to a dissolution. On the facts as at present found it could be fairly said that such conduct was not precipitate or unreasonable, and that the claim then asserted by his action that defendant's incapacity was permanent and warranted a dissolution was justified. If without fault on his part the processes of litigation have been delayed until a judgment of dissolution, taking effect when rendered, will be of no benefit whatever, the cases which have been cited and principles of equity undoubtedly would entitle the court by relation of its judgment, to secure him in the rights which he asserted, and as now found possessed, without impairment by delays and obstacles for which he was not responsible.

It is urged with much vigor that the plaintiff's insistence upon a dissolution of the copartnership as of an earlier date, such as that of the commencement of the action, is so inequitable that it should be denied as a matter of law, but this is not so. There is no reason why the plaintiff rather than the defendant should bear the disadvantages resulting from the latter's unfortunate affliction. Plaintiff by reason of this action is not to be held responsible because if an earlier dissolution of the partnership shall be adjudged, the result will be that during the subsequent period defendant will have been subjected to the liabilities of the copartnership without participating in any profits. Defendant by assenting to a dissolution when demanded by plaintiff could have avoided any such consequences as the result merely of his sickness. There still would have remained, however, the provisions

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of the articles of copartnership expressly providing for a period of five years within which his capital should be repaid to a partner after the termination of the copartnership for any reason.

The judgment should be reversed, and a new trial granted, with costs to abide event.

WERNER, COLLIN, and HOGAN, JJ., concur. CULLEN, Ch. J., and CHASE, J., dissent. WILLARD BARTLETT, J., absent.

Judgment reversed, etc.

(Court of Appeals, December, 1913.)

**WELD, Respondent, v. POSTAL TELEGRAPH
CABLE CO., Appellant.**

(210 N. Y. 59, 103 N. E. 957. Rev'g 148 App. Div. 588, 133 N. Y. Supp. 228.)

1. Telegraphs and telephones — Regulations — Limiting liability.

A telegraph company has a right to make reasonable regulations for the transaction of its business and to protect itself against liability which it might otherwise incur due to the carelessness of its agents and mistakes and defaults incident to the transaction of its business.

2. Telegraphs and telephones — Stipulations on blank form — Reasonable regulations.

The stipulations printed in the blank form used in sending telegrams that the company "shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatd message, beyond the amount received for sending the same;" nor on "any

Note.—Limitation of liability of telegraph company for unrepeatd messages.

- a. *Validity of limitation*, 460.
- b. *Presumption as to consent to limitation*, 464.
- c. *Binding effect upon receiver of message*, 466.
- d. *When stipulation limiting liability applies*, 467.
- e. *Gross negligence or willful misconduct as affecting limitation*, 470.

a. Validity of limitation.

It is competent for a telegraph company to make such rules and to prescribe such regulations for the conduct of its business as are reasonable: and it is entitled to protect itself against the incidental hazards of operation and, by contract, to limit its liability for mistakes, or delays, or non-delivery, caused by the negligence of its servants, if not gross.

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unrepeated message beyond fifty times the sum received for sending same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages," are reasonable regulations, and create a contract between the sender of the message and the telegraph company.

3. Telegraphs and telephones — Regulations on telegram form — Gross negligence.

Public policy forbids that any regulations or contract, contained on a telegram form limiting the company's liability for mistakes, delays and nondelivery, shall relieve it from liability caused by gross negligence of its agents and employees.

4. Negligence — Gross negligence — Definition.

Gross negligence is the commission or omission of an act or duty owing by one person to a second party which discloses a failure to exercise slight diligence, i. e., the act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care.

5. Telegraphs and telephones — Gross negligence — Extraordinary facilities on busy day.

Gross neglect cannot be attributed to a telegraph company for failure to provide extraordinary facilities to insure speed and accuracy in the transmission and receipt of messages on "Bureau Day," or by rea-

Limitation of liability of telegraph company for unrepeated messages.—Continued.

Halsted v. Postal Telegraph-Cable Company, 193 N. Y. 293, 85 N. E. 1078.

Kiley v. Western Union Telegraph Company, 109 N. Y. 231, 16 N. E. 75.

Breese v. United States Telegraph Company, 48 N. Y. 32.

Young v. Western Union Telegraph Company, 65 N. Y. 163.

Riley v. Western Union Telegraph Company, 8 Misc. 581, 26 N. Y. Supp. 532.

Curtin v. Western Union Telegraph Company, 16 Misc. 347, 38 N. Y. Supp. 58.

Dixon v. Western Union Telegraph Company, 3 App. Div. 60, 38 N. Y. Supp. 1056.

Weld v. Postal Telegraph-Cable Co., 199 N. Y. 88, 92 N. E. 415.

The contract construed in *Bennett v. Western Union Telegraph Company* (50 Hun, 500, 2 N. Y. Supp. 365), was printed at the top of the telegraph

son of the amount of business likely to be transacted on a particular day.

6. Telegraphs and telephones — Telegram — Delay in delivery — Question of law.

While delay in the delivery of a telegram may, in some cases, be considered upon the question of negligence, it is for the court in the first instance to determine whether the delay was of such duration, under the circumstances adduced upon the trial, that negligence could be inferred.

7. Telegraphs and telephones — Transmission of message — Immaterial mistakes.

Where a telegram as sent read: "To Ellis N. O. Sell 20 thousand Mch 12.70 Weld.," and as received read: "To Ellis Sell twenty thousand March 1207 Well," the omission of "N. O.," the change of "20" to "twenty," "Mch" to "March" and "Weld." to "Well" are immaterial mistakes and do not disclose an absence of slight care on the part of the telegraph company, where they do not contribute to the injury complained of.

8. Telegraphs and telephones — Telegram form — Failure to fill in blanks — Effect.

The failure of the receiving operator of a telegraph company to fill in the blank on a telegram under the words "Sent by," or to insert the hour of receipt of the message, or of the sending operator to transmit the number of words or his signal, has no relation whatever to the

Limitation of liability of telegraph company for unrepeatd messages.—Continued.

blank. The liability of the company for unrepeatd messages was limited to the amount paid for transmission, and for repeated messages its liability was limited to fifty times the amount paid. The court held that the contract of limitation was reasonable.

A regulation of a telegraph company that its messenger boy, sent to receive a telegram for transmission, shall be deemed the agent of the sender, is invalid. *Will v. Postal Telegraph-Cable Co.* (3 App. Div. 22, 37 N. Y. Supp. 933). The court in that case said: "It is undoubtedly within the power of a telegraph company, as it is of any other corporation, to make rules and regulations for the proper conduct of its business; but such rules must be reasonable in their character, and in accord with good sound public policy. The one under consideration was neither. On the contrary, it was an imposition upon the public and upon every patron of

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contractual relation existing between the company and the sender of the message.

9. Telegraphs and telephones — Unrepeated message — Failure to confirm — Gross negligence.

The failure of a telegraph company's operators to confirm a message cannot be considered as a circumstance on the question of gross negligence, where all that the sender of the message contracted and paid for was an unrepeated message.

Appeal from a judgment of the Appellate Division, First Department.

Action by Stephen M. Weld and another against the Postal Telegraph Cable Co. to recover damages for error in the transmission of a telegram.

Charles F. Brown, of New York City, for defendant-appellant.

Henry W. Taft, of New York City, for plaintiff-respondents.

HOGAN, J. Plaintiffs, as copartners, under the name and style of Stephen M. Weld & Co., were engaged in the business of

Limitation of liability of telegraph company for unrepeated messages.—Continued.

the defendant who had not the time or disposition to go in person to its transmitting office for the purpose of sending a message."

Judge Gray, in *Halsted v. Postal Telegraph-Cable Co.* (193 N. Y. 293, 85 N. E. 1078), said: "The defendant, while it may be likened to a common carrier, in its occupation of conveying messages from, and to, all persons, unlike a common carrier of goods, does not become an insurer in their transmission. Its duties are performed in a different way. The reasons for making common carriers of goods insurers of their value do not apply in the case of telegraph systems; for there is no custody of goods, and the conveyance of messages is subject to the contingencies of extraneous disturbances beyond the control of the telegraph owner, or to the fallibility of operators in transcribing by signals, or symbols, or in comprehending the message itself as written. By reason of the franchises

cotton brokers in the city of New York, and are members of the New York Cotton Exchange. On December 4, 1905, and for some time prior thereto, the defendant maintained a special office for the transaction of its business as a telegraph company in the building occupied by the Cotton Exchange in the city of New York and a similar office in the New Orleans Cotton Exchange. Communications between these two exchanges were carried on by means of two direct duplex wires known as "A" and "B." December 4, 1905, Edward M. Weld, one of the plaintiffs, delivered to defendant at its office in the New York Cotton Exchange a message for transmission to New Orleans, written upon one of the blanks furnished by defendant, of which the following is a copy:

"Counter Number. Time Filed. Check.

"Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

"Dec. 4, 1905.

"To Ellis N. O.

"Sell 20 thousand Mch 12.70

"Weld."

Limitation of liability of telegraph company for unrepeatd messages.—Continued.

and powers accorded to it, a telegraph corporation performs public functions and it comes under that general obligation, to which all quasi-public corporations are subject, to conduct its corporation business, and to discharge the duties incident thereto, with reasonable diligence, and with a due care for the rights and interests of those concerned in the corporate operations. But, however strictly held to this general obligation, it is competent for it to make rules and to prescribe such regulations for the conduct of its business as are reasonable. It is entitled to protect itself against the incidental hazards of operation and, by contract, to limit its liability for mistakes, or delays, or nondelivery, caused by the negligence of its servants, if not gross."

b. Presumption as to consent to limitation.

That a telegraph company cannot limit its liability for mistakes or

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Upon the reverse side, amongst the stipulations, was the following:

"The Postal Telegraph-Cable Company (incorporated) transmits and delivers the within message subject to the following terms and conditions:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any REPEATED message specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. * * *

"Correctness in the transmission of messages to any point on the lines of the company can be insured by contract in writing, stating agreed amount of risk and payment of premium

Limitation of liability of telegraph company for unrepeatd messages.—Continued.

delays in the transmission of messages or for the non-delivery thereof due to the negligence of its servants, unless notice of such limitation is brought to the attention of and assented to by the sender thereof, is well established by authority.

Pearsall v. Western Union Telegraph Co., 124 N. Y. 256, 26 N. E. 534.

Curtin v. Western Union Telegraph Company, 16 Misc. 347, 38 N. Y. Supp. 58.

Dixon v. Western Union Telegraph Company, 3 App. Div. 60, 38 N. Y. Supp. 1056.

In Halstead v. Postal Telegraph-Cable Company (193 N. Y. 293, 85 N. E. 1078), the receiver of a message was the one that procured it to be sent by telegraph. The blank on which the message was written pro-

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thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: one per cent. for any distance not exceeding 1,000 miles and two per cent. for any greater distance. * * *

The message was not ordered by Mr. Weld to be repeated. The tariff for forwarding the same, 60 cents, was paid by the plaintiffs. It is conceded that the message as delivered to defendant's operator was intended to instruct Ellis & Co., plaintiffs' brokers, in New Orleans to sell 20,000 bales of cotton at \$0.1270 cents per pound for delivery in March.

The original message read in evidence contained certain words and figures which were not placed thereon by Mr. Weld, to wit: Under the words "Time Filed" was placed "1:39 p. m." indicating the hour (New York time) the message was sent. Under the word "Check" appeared "9—60" representing the number

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vided that if the sender of the message should fail to order it repeated the company would not be liable for mistakes, delays or nondelivery. The court held that this was a reasonable regulation and that the receiver of the message was bound thereby.

The blank in question in *Breese v. United States Telegraph Company* (48 N. Y. 132), contained a provision to the effect that the company would not be liable for any error in the transmission of the message unless it was repeated. The blank was taken from a number of blanks furnished by the company and in the possession of the sender, and the court held that the sender was presumed to know the contents thereof.

Where the sender of a message writes it upon a telegraph blank at the top of which is printed the terms upon which the company agrees to transmit messages with a statement at the end directing the company to send the message written below on the "above terms, which are agreed to," a binding contract is made between the parties.

Young v. Western Union Telegraph Co., 65 N. Y. 163.

c. Binding effect upon receiver of message.

Halsted v. Postal Telegraph-Cable Company (193 N. Y. 293, 85 N. E. 1078), was an action brought by the addressee of a telegraphic message.

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of words (each figure counting as a word) and the amount paid for the transmission of the message, 60 cents.

The message as delivered read as follows:

"Number b 84 Kx "Dated Kx. New York.	Sent by Dec. 1905	Rec'd by Kx	Check 8 Received at 1244 (Where any reply should be sent) 190
--	--------------------------	----------------	---

"To Ellis
"Sell twenty thousand
"March 1207
"Well"

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He had procured the message to be sent by telegraph. The blank on which the message was written provided that if the sender thereof should fail to order it repeated the company would not be liable for mistakes, delays or nondelivery. The court, in holding that the plaintiff was bound by the regulation which was reasonable, said: "It is our judgment that where the receiver of a message has, by a special request, procured it to be sent by the telegraph, he becomes bound by any reasonable contract made by the sender with the telegraph company for its transmission and is limited in his claim for any damages for a loss occasioned by error, or mistake, in transmission, where the stipulations for the repetition, or for the insurance, of the message have not been availed of, to the amount stipulated in the contract."

d. Application of stipulation limiting liability.

The telegraph blank construed in *Bryant v. American Telegraph Company*, 1 Daly, 575), had printed thereon a provision to the effect that the company would not be responsible for any delay in the transmission of a message. The court held that this provision did not apply to mistakes or delays in the delivery of a message after transmission.

The complaint in *Baldwin v. United States Telegraph Co.* (54 Barb. 505), was that the message was never transmitted. The court in holding

One Henican, the board member of the firm of Ellis & Co., received the message at 12:43 $\frac{3}{4}$ New Orleans time, or 1:43 $\frac{3}{4}$ New York time, 4 $\frac{3}{4}$ minutes after the message was marked as having been sent, and understood from the same that he was to sell for the account of the plaintiffs 20,000 bales of cotton for delivery in March at the prevailing market prices not under 12.07. He was not misled by the signature "Well" instead of "Weld." The mark "b 84" indicated that the message was the eight-fourth message on the B wire that day. The blank under the printed words "Sent by" was used for the sending operator's signal, and it was the duty of the receiving operator to fill in that blank. The mark "Kx" under the printed words "Rec'd by" signified the receiving operator's wire signal. The figure "8" under the word "Check" represents the number of words in the message. The figures "1244" under the words "Received at" designate the time the telegram was received. After the printed word "Dated" occur the words "Kx. New York, Dec. 1905" in red stamp. The words "Kx New York" mean that the message originated in the Cotton Exchange office

Limitation of liability of telegraph company for unrepeated messages.—Continued.

that the company was not protected by a clause to the effect that the company would not be liable for "delay, error or remissness," said: "The contract then, was that the defendants would not be liable for delay, error or remissness. These being the only particulars specified in the terms and conditions of the special contract, they cannot claim exemption or release from any which by their contract they were bound to perform, other than such as are expressly specified. They cannot in law, receive the consideration and be bound in duty, and then neglect or refuse to perform the duty at all. The complaint charges, not any delay, error or remissness, but that the message was never transmitted at all by the defendants to Rouseville, nor delivered to the said Eric Darling, who it was charged was then and for a long time afterwards at the place where the message was directed by the plaintiffs. This is denied by the sixth answer, which for this purpose stands alone. An entire neglect and refusal to perform this contract, by the defendants, does not bring them within the excepted terms. "Delay" in sending and delivering a message implies that it was or would be sent at some time, but not sent or delivered promptly. 'Error'

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in New York. The receiving operator in New Orleans made manifold copies of all telegram orders received in the Cotton Exchange office. A carbon sheet was placed between two blanks and the message written, the original delivered to the party addressed and the carbon copy retained for filing in the office.

A manifold copy of the message was produced on the trial, and the following is a copy of the same:

			"Del No 390
"Number	Sent by	Rec'd by	Check
"B 84 Kx		Kx	
"Kx New York.			
"Dated Dec. 4, 1905		Received at 1244 P	
"(Where any reply should be sent)			
"To Ellis			
"Sell twenty thousand March 1207			
"Well"			

Limitation of liability of telegraph company for unrepeatd messages.—Continued.

in sending or delivering a message implies sending or delivering a wrong message, or to the wrong place or person. 'Remissness' also implies a sending or delivering, but in a tardy manner. It is neither delay, error nor remissness that is charged, but the entire omission or refusal to send or deliver the message, and this is admitted." This case was reversed on another point in 45 N. Y. 744.

And in *Sprague v. Western Union Telegraph Company* (6 Daly, 200), the stipulation was that the company would not be liable for a "mistake or delay in the transmission or delivery, or a nondelivery" of the message; and the court held that failure to transmit was not covered by the stipulation.

In *Kiley v. Western Union Telegraph Company* (109 N. Y. 231, 16 N. E. 75), the court, in dealing with a similar stipulation, said: "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it

The carbon copy varied from the original in that the figure "4" followed the word "Dec." and the figure "60" followed the figure "8" under the word "Check." The words "Del No. 390" were added. The letter "P" followed the figures "1244." The letters and figures "Dec—05" on the original and copy were stamped on the blanks each morning for the purpose of saving time. The figures "60" indicated the price of transmission of the message. It was not the duty of the receiving operator to place the figures "60" on the message as delivered; they were placed there for the purpose of audit and accounting. The letter "P" was an abbreviation for afternoon, showing receipt of the message at 12:44 p. m. Under the printed words "Sent by" appears a blank which was used for the sending operator's signal. This blank was not filled due to a general order in force in December, 1905, which provided the same should be omitted.

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went as far as Buffalo at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was not shown that the failure was due to the willful misconduct of the defendant, nor to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation."

e. Gross negligence or willful misconduct as affecting limitation.

The plaintiffs in *Mowry v. Western Union Telegraph Co.* (51 Hun, 126, 4 N. Y. Supp. 666), gave a message to the defendant for transmission and delivery on a blank containing the following provision: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." When, in the order of transmitting messages, the plaintiff's message was reached, it was taken by the defendant's operator from the place where messages to be sent were kept, and he called the office to which it was to be transmitted, and found the wire in use. While

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December 4, 1905, was known as "Bureau Day," when the government published an annual report in regard to the prospective cotton crop. The publication of such report results in activity and fluctuations in the market. On the day in question a large volume of business was transacted on the Exchange. Wire A had been in general use down near to the time when the telegram in controversy was presented. Wire B was used for the overflow business and when wire A was interrupted. The message was transmitted on wire B.

Mr. Weld first sought to have an oral message sent by defendant to Ellis & Co., to "sell thirty thousand March 12.70" but the manager declined to send the same, saying "No, that is too big." Thereupon the message referred to was written and the time "1:39" placed thereon. The sending operator had knowledge of a refusal to send the oral message, and wired the operator at New Orleans, "Here comes a big order;" it being

Limitation of liability of telegraph company for unrepeatd messages.—Continued.

waiting, his attention was engaged by some person having business at the office, and before attending to him the operator placed the message among the messages that had been sent. As a consequence the message was not sent until 7 or 8 days afterwards. The court held that this was gross negligence and not within the provision of the contract.

The plaintiff in *Postal Telegraph-Cable Company v. Robertson* (36 Misc. 785, 74 N. Y. Supp. 876), sued for the price of sending certain telegrams, and the defendant counterclaimed for damages caused by the plaintiff's delay in sending one of said telegrams. The defendant was a broker on the Produce Exchange and sent the telegram from the floor of the exchange by the delivering it to the plaintiff's operator there. The telegram was an important one, and was, with the exception of the address, in cipher. The operator knew that the defendant was such broker, and that the telegram was according to the cipher code used by brokers to purchase and sell grain. The said telegram was plainly directed to Churchill & Co., Toledo, Ohio; yet through some unexplained mistake the plaintiff sent it to Churchill & Co., Chicago, Ill. This firm, perceiving that the telegram was not for them, returned it to the plaintiff in New York, and not until then did the plaintiff's servants and agents perceive the error, and send the telegram to Churchill & Co., Toledo, Ohio. The defendant claimed

greater than any theretofore sent by him. He received the written message from Mr. Weld, and asserted upon the trial that he transmitted the same as written. The operator at New Orleans asked him on the wire "if that was 'twenty'—that is the '20'—I replied that it was 'twenty,' spelling the word out."

Wire B ran directly through the office of the defendant at New Orleans, where, as claimed by the plaintiffs, it passed through a machine known as a Morsegraph, from which it continued to the New Orleans Cotton Exchange. The Morsegraph automatically records on the tape all messages that come over the wire passing through it. Defendant also keeps a book called a "log" of the working of the Morsegraph. These records are kept by the defendant for six months from the day the messages recorded pass over the wires. Prior to the expiration of six months from the time when this particular message was

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to have been damaged \$250 by the delay, and swore positively that by reason thereof the grain was not purchased until some time later, which caused the loss indicated. The telegram in question was a nonrepeated one, and the contract on the back of the telegraph blank limited the plaintiff's liability for any damage caused by delay to the amount received for sending the telegram.

The court held that under the circumstances the plaintiff was liable for the damage caused, as the unexplained and unexcused delay was a case of gross negligence.

In *Will v. Postal Telegraph-Cable Co.* (3 App. Div. 22, 37 N. Y. Supp. 933), the court said: "It is now a well settled rule of law that corporations may restrict their common law liability by express stipulation. This rule has its limitations, however; and such advantage has been taken of the opportunity which it affords to certain classes of corporations to escape all liability upon their contracts that the tendency of the courts has very properly been in the direction of its restriction, rather than expansion. * * * It has never, so far as we are aware, been held to exempt a corporation from the consequences of conduct which amounts to gross negligence, but precisely where to draw the line between acts of ordinary negligence and those to which a harsher term may be applied is sometimes attended with considerable difficulty. Fortunately, however, this case is

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sent, the attorney for the plaintiff notified the defendant to preserve the record of this message as it would be needed at the trial of this action. This the defendant failed to do, and at the trial it was admitted that the record had been destroyed. Witnesses were called by the defendant, and they testified that on December 4, 1905, the Morsegraph was not in operation as claimed by the plaintiffs.

Plaintiffs offered evidence to show the sale by Ellis & Co. of 20,000 bales of cotton on their account at prices below 12.70 per pound, and the purchase after discovery of the error of 20,000 bales, resulting in a loss to them, including broker's commissions, of \$27,565.

Upon the trial plaintiffs had a verdict inclusive of interest for \$36,684.12. Judgment was entered thereon and for costs, and the judgment was affirmed by a divided court in the Appellate

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relieved of this embarrassment, for, if ever there was an act which could be characterized as flagrantly careless, it was the omission of this defendant to forward the dispatch in question. A telegram had been received from one of the plaintiffs who was in the city of New York, addressed to his firm, in the city of Buffalo, which not only bore upon its face evidence that it related to important business affairs which required prompt attention, but it also in express terms demanded an immediate reply; and with a full appreciation of its importance, as well as of its requirements, the defendant's manager, McLean, sent it to the plaintiffs, with directions to the messenger boy by whom it was sent to wait for an answer. The answer was obtained by the messenger, and securely placed in his pocket, where it remained until accidentally discovered sometime on the following day; and, although he returned to the defendant's office soon after leaving the plaintiff's place of business, it does not appear that either the operator or the manager bestowed enough of thought upon the subject to inquire if the plaintiffs had furnished him with an answer. These facts are uncontroverted, and it seems that the defendant seeks immunity from the negligence which they establish, gross as it is shown to be, by a provision which it has incorporated into the "terms" or "conditions" upon which it consents to transact business with the public, and which is in effect, that whenever a message is sent to its office by one of its messengers, the latter is to be deemed the agent of the sender. This is certainly a most remarkable

Division, from which judgment defendant appeals to this court.

This court in several cases has considered the privileges and liabilities of a telegraph company and determined as follows:

That such a company has a right to make reasonable regulations for the transaction of its business and to protect itself against liability which it might otherwise incur due to the carelessness of its agents and mistakes and defaults incident to the transaction of its business.

That the stipulations printed in the blank form used in sending telegrams, adopted by the defendant and set forth in the statement of facts prefacing this opinion, were reasonable regulations, and created a contract between the sender of the message and the telegraph company.

That, notwithstanding the right of a telegraph company to adopt such regulations and the contract made between the sender of a message and the company, public policy forbids that such

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"regulation" and it is one of which, we have no hesitation in saying, the defendant should not be permitted to avail itself.

In *Ayers v. Western Union Telegraph Company* (65 App. Div. 149, 72 N. Y. Supp. 634), there was a delay of five hours in the transmission of a telegram, from one country district to another on Sunday. The terms appearing upon the back of the message included the following: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatd message, beyond the amount received for sending the same." The trial court submitted to the jury the question of fact, as to whether the delay in the delivery of the message "was a gross, improper, and unreasonable delay,—the delivery from the receipt of the message at Monmouth Beach at half past eleven to five o'clock, when the answer was received at Far Rockaway, on a Sunday. Was it a case of gross negligence on the part of the company?" Upon this point the court said: "I do not think that the testimony is sufficient to show negligence on the part of the defendant in the transmission of this message. It is undoubtedly the law that a delay in delivering a message may be evidence of gross negligence, but the question must be first determined by the court whether the delay was so great that negligence could

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regulations and contract shall relieve a telegraph company from liability caused by *gross* negligence of its agents and employees. *Kiley v. Western Union Telegraph Co.*, 109 N. Y. 231, 16 N. E. 75; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L.R.A. (N.S.) 1021, 127 Am. St. Rep. 952; *Weld v. Postal Telegraph Cable Co.*, 199 N. Y. 88, 92 N. E. 415.

The trial justice stated to the jury the rules of law referred to and charged that the question to be determined in this action is, "Was this such a mistake as these people contracted with each other should not be construed as a ground of damage, or was it a mistake arising from the *gross* negligence of the defendant's employees, or some one of them? If it was a mere mistake, no matter how arising, there can be no recovery by the plaintiffs, and there can be no such recovery unless you find that mistake was caused by the gross negligence of the defendant's employee."

In view of an affirmance by the Appellate Division by a

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properly be inferred; and that must necessarily depend to a large extent upon the distance of the stations apart, the nature of the business transacted at both the sending and receiving station, and the location of the residence of the person to whom the dispatch was to be delivered. In none of the cases to which our attention has been called has it been held that the delay of about five hours in the transmission of a telegram from an office located in a country district in one state to an office located in a country district in another state, especially on a Sunday, when telegraph offices, as well as the offices of other persons and corporations engaged in the transaction of business, are necessarily closed for a portion of the day, has been of itself held to be evidence of gross negligence." In distinguishing this case from the case of *Pearsall v. Western Union Telegraph Company* (124 N. Y. 256, 26 N. E. 534), the court said: "In that case a telegram was sent from a place on Long Island on July 31st, at about 8 o'clock in the morning, to a firm of brokers in the city of New York. The telegram was sent to T. W. Pearsall & Co., but when it was received in New York the words "& Co." were left off, and it was received in the office of T. W. Pearsall & Co. before ten o'clock in the morning. It was thus received within two hours from the time it was sent, and there was therefore no delay in the transmission of the message; the mistake of the company being in directing it to "T. W. Pearsall" instead of to "T. W.

divided court, we must determine whether or not the circumstances, or any of them, adduced upon the trial of this action, justified the trial justice in a submission of the case to the jury upon the question of gross negligence upon the part of the defendant.

On behalf of the plaintiffs, it is asserted that the following circumstances, taken together, disclose gross negligence on the part of the telegraph company: (1) December 4, 1905, was "Bureau Day," as described; that defendant's employees had knowledge of the commotion it was likely to arouse, and it was therefore incumbent upon it to provide extraordinary facilities to insure speed and accuracy in the transmission and receipt of messages; (2) the fact that the sending operators had never sent so large an order prior to that day, and that he called the New Orleans operator and warned him "Here comes a big order;" (3) that the message was not immediately received in New Orleans, having been sent 1:39 p. m. New York time, it should have been received at New Orleans at 12:39 p. m. New Orleans time, and the large amount of business that day demanded more than ordinary promptness; the message was marked received

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Pearsall & Co.," and it was for this mistake in the address of the message that the company was held liable. The fact that the telegram was delivered with a different direction than that with which it was sent made out a *prima facie* case of negligence against the defendant. This was not, therefore, a case of neglect to deliver the message, but one where the message as delivered was substantially different from the message as received, and in consequence of such difference the message was given to the person it should have been delivered had the correct address been transmitted by the telegraph company."

From the evidence produced in *Riley v. Western Union Telegraph Co.* (6 Misc. 221, 26 N. Y. Supp. 532, *aff'd* 8 Misc. 217, 28 N. Y. Supp. 581), it was shown that a message was received for transmission before 1 p. m. at which time the operator "called the office where the message was to be sent, but could not" raise it. Similar attempts were made with like result at 1:15, 1:25, 1:30, 1:40, 1:50, 2, and 2:10 p. m., the message being sent at 2:10. It was also shown that the telegraph wire between the two

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at 12:44 p. m., while as a matter of fact it was delivered at 12:43 $\frac{1}{4}$ p. m.; (4) the operator at New Orleans, upon the receipt of the message, immediately asked the sending operator at New York whether the figures "20" was "twenty" written, to which a reply was made "twenty," thus disclosing knowledge by the New Orleans operator of the importance and magnitude of the order; (5) the omission of "N. O." written by Mr. Weld on the message to be sent; (6) the change of "20" in figures to "twenty;" (7) the word "Mch" in message as written changed to "March" when received; (8) a transposition of figures "12.70" to "1207" omitting the decimal point; (9) the change in signature from "Weld" to "Well"; (10) the failure of receiving operator to discharge his duties by not filling in the blank under the words "Sent by" and the blank left for the date while other operators did fill in such blanks; (11) that in some subsequent messages passing between the parties on the same day the same operator in New Orleans neglected to fill in the blank under the printed words "Sent by" and the blank left for the date, while other operators did fill in such blanks; (12) the failure on the part of the two operators to confirm the entire

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places was "grounded," or "dead," from 12 o'clock noon to 2:22 p. m. the time when the message sent at 2:10 was received at the receiving office. The court in holding that the defendant was not liable beyond the amount paid to send the message said: "Unless then there is some evidence of willful misconduct or gross negligence on the part of the defendant, the plaintiff's damages, even if the defendant is negligent, are limited to the amount paid for sending the messages; for all the authorities declare, in case where no contract has been made, and where the message is sent unconditionally, that mere delay, unexplained, is *prima facie* evidence of negligence, but not so in view of the terms of the contract, in order to entitle plaintiff to recover any greater sum than provided for by the contract."

In *Pearsall v. Western Union Telegraph Company* (124 N. Y. 256, 26 N. E. 534), the court said: "This action was tried and a recovery had at circuit, which was sustained at the general term on the theory that the

message rather than to limit the confirmation to the figures "20;" (13) that the record appearing on the Morsegraph in New Orleans was located outside the office of defendant, disclosed the fact that the message as sent read "12.70" instead of "12.07" thus indicating that the operator at New York had forwarded and repeated the correct message and the mistake occurred in the Cotton Exchange office by reason of the error of the receiving operator there located, and that the tape record of the Morsegraph and the Morsegraph "Log" had been destroyed by the defendant after notice by plaintiffs to preserve the same.

Counsel for defendant requested the court to separately charge the jury: (1) That the omission of the words "N. O.;" (2) the substitution of "twenty" for "20;" (3) the change from "Weld" to "Well;" (4) the failure to transmit the number of words in the message; (5) the neglect to transmit the sending operator's signal; (6) the omission to insert the hour of the receipt of the message; (7) the transposition of the figures "0" and "7"—was not proof of gross negligence on the part of the defendant. In each instance the trial judge in substance said:

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contract between the parties was the one implied by law when a telegraph company receives, without conditions, a message for transmission. Among other obligations implied in such a case, is the duty to accurately transmit and deliver to the addressee the message received, which in this case defendant failed to do, as it admits, by reason of the mistake of the operator who received and undertook to forward the communication. Under such a contract a telegraph company does not insure the accurate transmission and delivery of a dispatch, but undertakes to exercise due diligence to do so. * * * The court correctly instructed the jury that the evidence made out a *prima facie* case of negligence against the defendant. In the cases holding that telegraph companies are only liable when grossly negligent, there were contracts exempting them from all liability, except to refund the tolls received for negligently sending or delivering the communication. Without considering whether there is any legal distinction to be drawn between gross and ordinary negligence in such cases, it is sufficient to say that these cases are not germane to the question in the case at bar."

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"I so charge you that alone would not be proof of gross negligence, but you must take that into consideration with all the other circumstances in arriving at a conclusion as to whether or not there was gross negligence," to which modified charges the counsel for the defendant excepted.

The court also charged the jury that it was not the duty of the defendant or its operators to confirm or repeat the message or any part of it, and the omission to confirm or repeat the message or any part of it was not gross negligence, but upon request of counsel for the plaintiffs did charge "that the question whether there was a duty to confirm or repeat depends upon all the circumstances of the case, and is to be considered by the jury in connection with all the circumstances; and they are to determine whether the omission to do so in connection with these circumstances amounted to gross negligence."

The court was requested to and did charge "that the amount involved in the transaction between the plaintiffs and Ellis does not determine the degree of care the defendant should have used in the transmission of the message," but added: "That is true ts a question of law; but you are to take into consideration the

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And in *Baldwin v. United States Telegraph Company* (45 N. Y. 744), the court said: "But an error in transcribing the direction, and a consequent misdelivery, are *prima facie* evidence of neglect and want of care in the operator, and cast the burden upon the company in explaining the error, and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. For the purposes of this appeal, it is assumed, but not decided, that this message was not subject to the terms and conditions ordinarily attached to the receipt of messages for transmission, but that the defendant is subject to all the liability which legally results from a receipt of a message, and a naked agreement to transmit the same to its destination for a reasonable compensation paid therefor. If the terms and conditions ordinarily imposed were a part of the contract, the question would arise whether the defendant would not be protected against liability for the 'error and delay' in the delivery of the dispatch."

amount involved in this transaction as one of the elements which you are to consider in arriving at a conclusion as to whether or not due care was exercised in the transmission of the message," to which counsel for defendant excepted.

Counsel for the defendant took exception to the charge of the trial justice to the jury that they had a right to find gross negligence in the failure on the part of the defendant to exercise the care required under the circumstances, and asked the court to charge the jury that failure to exercise the care required under the circumstances in this case was not gross negligence unless the failure to exercise such care was intentional or willful, which charge the court declined to make, and an exception was taken by the counsel for the defendant. The effect of the charge made by the trial justice was that numerous circumstances, no one of which would in and of itself constitute gross negligence for which the plaintiffs could recover against the defendant, might be considered by a jury upon the question of gross negligence.

Irrespective of the decisions of other jurisdictions the courts of this state have uniformly recognized a distinction between ordinary and gross negligence. In *First National Bank of Lyons v. Ocean National Bank* (60 N. Y. 278, 295 [19 Am. Rep. 181]), Judge Allen wrote: "* * * * The term itself has been quarreled with, but it still has a place in the law, and must have, as long as the measure of liability implied by the term is recognized, and until some better term can be invented to give expression to it. * * * It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. * * *"

In *Gurney v. Grand Trunk R. Co.*, 14 N. Y. Supp. 321, at page 322; affirmed on opinion there reported, 138 N. Y. 638, 34 N. E. 512, the complaint alleged that defendant received plaintiff as a passenger with his baggage, a trunk, which in addition to his wearing apparel contained samples of cutlery; that by reason of negligence of defendant the train was derailed and the contents of the trunk destroyed. Defendant interposed

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a demurrer. The question presented was as to the liability of defendant as a bailee where the property had been lost through its negligence, though defendant may not be liable upon its contract as carrier, and therefore not an insurer. The General Term, Van Brunt, J., held that under the circumstances the defendant was liable only for gross negligence, and defined gross negligence as follows: "Now, what is gross neglect? As contradistinguished from 'ordinary neglect,' 'gross neglect' means acts equivalent to willful acts, upon the part of the bailee, by which the property is lost. Where he willfully refuses to take any precaution for the purpose of saving or caring for the property, the bailee is guilty of gross neglect. It is not where he simply fails to use the ordinary care which a prudent person would exercise under the circumstances."

The same rule was quoted and applied in *Cattaraugus Cutlery Co. v. Buffalo, R. & P. R. Co.*, 24 App. Div. 267-270, 48 N. Y. Supp. 451.

In *Halsted v. Postal Telegraph Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L.R.A.(N.S.) 1021, 127 Am. St. Rep. 952, the action was brought to recover damages for error of the defendant in the transmission of a telegram. The message was written on a blank furnished by defendant, and as delivered read: "Delivered commencing about August fifteenth light narrow two eighth wide three-eighth net." As sent, the words "Deliveries" instead of "Delivered" and "two eighty" and "three eighty" in place of "two eighth" and "three eighth" were used.

This court, per Gray, J., said (193 N. Y. at pages 299, 300, 85 N. E. at page 1080 [19 L.R.A.(N.S.) 1021, 127 Am. St. Rep. 952]): "Whether such changes were the inadvertent, or mistaken, act of the receiving operator, or of any operator at the relay station, or whether they were the result of atmospheric disturbances, * * * is not material, * * * However occurring, if by no wilful misconduct, a mere mistake, or error, in the transmission of a message would not warrant a jury in finding that there had been more than ordinary negligence."

The cases cited recognize a distinction between ordinary and
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gross negligence, from which it may be said that gross negligence is the commission or omission of an act or duty owing by one person to a second party which discloses a failure to exercise slight diligence. In other words, the act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care.

To justify a recovery in this case it was incumbent upon the plaintiffs to establish an absence of contributory negligence upon their part and gross neglect upon the part of the employees of defendant. The onus thus imposed was not satisfied by proof of error in the transmission of the message. It was incumbent on the plaintiffs to establish that the operators of the defendant were lacking in that degree of care to which we have called attention, and, if the facts developed were as consistent with the exercise of slight care and diligence as with the absence of the same, plaintiffs would not be entitled to recover.

In view of the determination of this appeal we shall consider the facts relied upon by the plaintiffs.

Plaintiffs' business was that of cotton brokers, and their transactions were principally upon the Cotton Exchange. Mr. Weld had asked for and obtained a quotation from New Orleans, and wanted an oral order transmitted for the sale of 30,000 bales of cotton. The manager of defendant refused to accept an oral message, and Mr. Weld immediately wrote the message in question to Ellis & Co. The commotion likely to be aroused on "Bureau Day" was as well, if not better, known to plaintiffs than to the operators of defendant. The plaintiffs accepted the terms of the contract for the forwarding of the message in and by which the measure of liability of defendant for errors was limited to the amount paid for transmission thereof. Notwithstanding the amount involved in the transaction, upwards of \$1,000,000, plaintiffs did not order the message repeated, the additional expense of which was 30 cents, or contract to insure correctness, as provided for in connection with a repetition of the same, as they were privileged to do, but assumed the risk incident to the absence of slight care on the part of defendant.

Defendant was not required to provide extraordinary facili-

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ties to insure speed and accuracy in the transmission and receipt of messages on "Bureau Day." Gross neglect cannot be attributed to it for a failure so to do, or by reason of the amount of business likely to be transacted on a particular day. By statute defendant is required to receive and transmit messages with impartiality, and in the order in which they are received, subject to a penalty for a violation thereof. The obligation thus imposed was one of continuous duty. It was undisputed that the operators employed by defendant were skillful, and that the appliances in use were of the highest grade.

The fact that the sending operator had never sent so large an order prior to that day, and warned the receiving operator, "Here comes a big order," may be next considered. We may assume that the two operators had some information of the magnitude of the transaction, but as already stated the plaintiffs had knowledge equally with the operators. Was such knowledge on the part of the operators evidence of the absence of slight care on their part? When the message was received at New Orleans the operator there asked the sending operator whether "20" was "twenty," to which the reply was sent "twenty." Plaintiffs having placed the figures "20" in the message, a slight error would readily make it read "2" or "200;" thus the operators confirmed the figures "20" by spelling "twenty," disclosing the exercise of reasonable care rather than absence of slight care.

As to the interval of time between the sending of the message and the delivery of the same, less than five minutes, it was asserted by counsel for the plaintiff that there was no claim based alone upon the delay. The trial justice said to the jury that the only question as to the delay "is that is one circumstance which you should take into consideration with all the others in arriving at the conclusion as to whether or not there was gross negligence in the whole transmission of the message," to which counsel for the defendant excepted. While delay in the delivery of a telegram may, in some cases, be considered upon the question of negligence, it is for the court in the first instance to determine whether the delay was of such duration, under the circumstances adduced upon the trial, that negligence

could be inferred. Under the facts in this case, the time occupied in transmitting the message, the taking of the same from the wire, the act of the receiving operator in asking the New York operator as to the figures "20," reply to the same, and the delivery to Mr. Henican within the time stated, made the question of delay in this case one of law which should have been determined in favor of the defendant.

The omission of "N. O.," the change of "20" to "twenty," "Mch" to "March" and "Weld" to "Well" were likewise immaterial. The message was sent by direct wire to the Cotton Exchange at New Orleans, where plaintiffs intended the same to be sent. It was received and delivered to Mr. Henican, the representative of Ellis & Co., who testified that he understood from the same that he was to sell for the account of plaintiffs 20,000 bales of cotton for delivery some time during March at the prevailing market price not under 12.07, and that he was not misled by any of the changes above recited, or by reason of the signature "Well" for "Weld;" that he knew from whom the message came. The word "twenty" in place of the figures "20" and the change "Mch" to "March" would indicate the exercise of some care rather than the absence of the same on the part of the operator. Such circumstances are not of such character as tended to disclose an absence of slight care on the part of the defendant. The failure to insert the date of the message in view of the actual delivery of the same within a few minutes cannot be said to be a matter of importance.

The failure of the receiving operator to fill in the blank under the words "Sent by," or to insert the hour of the receipt of the message or of the sending operator to transmit the number of words or his signal had no relation whatever to the contractual relation existing between the parties, but on the contrary, was data for the use of the company in its business.

A failure of defendant's operators to confirm the message could not be considered as a circumstance on the question of gross negligence. Plaintiffs contracted and paid for the sending of an unrepeatable message. The defendant was not under obligation to repeat or confirm the message (i. e., "to make certain

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or sure, give new assurances of truth or certainty to, put past doubt, verify; confirmation supplies all defects, though that which had been done was not valid at the beginning"). It had provided means for forwarding a repeated or confirmed telegram, but under the terms of the contract with plaintiffs, it was not required to repeat or confirm the message.

That the Morsegraph at New Orleans disclosed that the operator in New York had forwarded and repeated the correct message, and the error arose by the negligence of the receiving operator, together with the destruction of the Morsegraph record and "logbook," is also urged upon our consideration. Assuming the correctness of this statement, the most favorable construction of the same would disclose that the material error in the message—i. e., the change from "12.70" to "1207"—arose in the New Orleans Exchange by some negligence on the part of the operator there, but facts sufficient to disclose a case of gross negligence upon his part were not established.

Upon a former trial of this action the trial justice in his charge to the jury referred to the importance of the transaction, which he said might be considered in determining the degree of defendant's negligence, though the amount involved did not determine the degree of care to be exercised in the transmission of the message. Plaintiffs had a verdict, and the judgment thereon was unanimously affirmed by the Appellate Division. Upon appeal to this court the judgment was reversed for error of the trial justice in a refusal to charge the jury, as requested by counsel for the defendant, upon the subject of wagering contracts. In view of the unanimous affirmance in that case this court was not permitted to examine the facts. Consequently we are not bound by any charge made to the jury upon that trial, in view of the nonunanimous decision by the Appellate Division on this appeal, whereby we are permitted to examine the facts and determine the question of liability as one of law.

Whether or not a defendant was guilty of gross negligence has frequently been determined as a matter of law. *French v. Buffalo, N. Y. & E. R. R. Co.*, *43 N. Y. 108; *Platt v.*

Richmond, Y. R. & C. R. R. Co., 108 N. Y. 358, 15 N. E. 393; Kiley v. Western U. Telegraph Co., 109 N. Y. 231, 16 N. E. 75; Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. ed. 883; Halsted v. Postal Telegraph Cable Co., 193 N. Y. 293, 85 N. E. 1078, 19 L.R.A.(N.S.) 1021, 127 Am. St. Rep. 952.

Did the plaintiffs make proof of facts from which the inference of gross negligence was the only one which could reasonably and fairly be drawn therefrom? We think they did not. What was the proximate cause, in the absence of which injury to plaintiffs would have been avoided? The several circumstances to which attention has been directed, assuming the message as received read as claimed, with the exception of "12.70" reading "12.07" did not contribute to the injury. Had the message been transmitted under all of the surrounding circumstances and read "Sell twenty thousand March 12.70" it is evident that necessity for this action would never arise. Hence the error which was the proximate cause of the injury arose from the change of the figures "12.70" to "1207."

It was claimed by respondent and was so held by the trial justice that the several circumstances to which attention has been called disclosed a carelessness by defendant in the method of transacting business; therefore a jury would be justified in drawing an inference therefrom that defendant was grossly negligent.

We have pointed out that a number of the circumstances relied upon are more consistent with due care on the part of the defendant than with the want of slight care. From such circumstances with others the jury was permitted to draw an inference of gross negligence, which as we view them was the only inference which fairly and reasonably could not be drawn therefrom.

The remaining independent acts and circumstances, in view of the contract made between the parties, a failure of plaintiffs to provide for a repeated or insured message, and the acts and knowledge of the plaintiffs, were not inconsistent with the exercise of slight care by defendant, and, being equally consistent

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with the absence as with the existence of gross negligence, failed to establish the essential facts necessary to a recovery. Had plaintiffs been able to disclose a lack of skill on the part of defendant's employees, or the use of appliances unsuited for the work undertaken, or that defendant had with knowledge of the incompetency of its operators retained them in its employ in the important work assigned them and furnished apparatus of an inferior grade, or facts of a like character, a different question would be presented for consideration. In the view we take of the evidence it was the duty of the trial justice to hold as matter of law that there was failure of evidence to show gross negligence.

The conclusions reached in this case do not tend to subject the public to the mercy of a telegraph company. While such a corporation is invested with certain privileges to be exercised by it for the public benefit, its liability must be measured by reasonable limitations. The opportunity is afforded to one doing business with it to protect himself from danger incident to error likely to arise. A failure to exercise the privilege extended at a small expense may result in a loss which might have been obviated by the injured party in the first instance. To hold that under the facts in this case gross negligence had been established would enable a party in nearly if not every case, to have a jury determine that a liability existed, when as a matter of fact only the absence of ordinary care was disclosed, and thus render telegraph companies liable as insurers of the accuracy of messages notwithstanding their contracts, a principle not favored by the courts of this state.

Defendant urges that it was not the agent of the plaintiffs for the purpose of sending the message, consequently no liability exists in favor of plaintiffs. In view of the conclusion reached in this case it is not necessary to determine that question. Numerous decisions of other states upon the subject were called to our attention. We think the question was settled against the view of defendant in the case of *Halsted v. Postal Telegraph Cable Co.*, 193 N. Y. 293, 303, 85 N. E. 1078, 19 L.R.A.(N.S.) 1021, 127 Am. St. Rep. 952, where this court,

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Judge Gray writing, adopted the rule laid down in *Ellis v. Am. Telegraph Co.*, 95 Mass. (13 Allen) 226.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur; MILLER, J., not sitting.

Judgment reversed, etc.

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*(Court of Appeals, October, 1913.)***WRIGHT, Appellant, v. SMITH, Respondent.**

(209 N. Y. 249, 103 N. E. 154. Appeal from 152 App. Div. 476, 137 N. Y. Supp. 264 dismissed.)

1. Appeal and error — Court of Appeals — Jurisdiction — Appeal from order reversing judgment and order denying motion for new trial.

The Court of Appeals has no jurisdiction of an appeal from an order of the Appellate Division reversing a judgment and order denying a motion for a new trial, when the Appellate Division is silent as to the

Note. — Right to appeal to Court of Appeals from order of Appellate Division granting new trial in jury cases.

Judge Miller in his opinion in the text case said: "In the last case cited (*Allen v. Corn Exchange Bank*, *infra*), Chief Judge Cullen reviewed the history of appeals from orders granting new trials. We do not know how to make language more explicit, and yet the attitude of counsel in this case and the amendment of 1912, said to have been recommended by the State Bar Association, indicate that the subject is not understood by the bar."

Because of these remarks it has been thought advisable, not only to use the text case in these reports, but to set forth below the opinion of Chief Judge Cullen referred to by the court as well as § 1338 of the Code of Civil Procedure as amended by chapter 361 of the Laws of 1912.

The opinion of Chief Judge Cullen in *Allen v. Corn Exchange Bank* (181 N. Y. 278, 73 N. E. 1026), was as follows: "At the Trial Term the plaintiff recovered a verdict, and thereupon the defendant moved on the judge's minutes to set aside the verdict and for a new trial upon the exceptions and because the verdict was against the weight of evidence. The defendant's motion was denied, and thereafter judgment was entered on the verdict. The defendant appealed from the judgment and the order denying its motion for a new trial, and on appeal the Appellate Division reversed such judgment and order, both on questions of law and fact, and granted a new trial. From the order granting a new trial the plaintiff has appealed to this court.

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grounds of reversal, because when the appeal is both from the judgment and an order denying a motion for a new trial the Appellate Division may reverse on the exceptions without passing on the weight of evidence, and if the Court of Appeals should entertain the appeal and reverse the judgment of the Appellate Division it would result in depriving the defeated party of the right which the law gives him to have the facts reviewed by the Appellate Division.

Appeal from an order of the Appellate Division, Second Department.

Action by Julia F. Wright, administratrix of the estate of Frederick W. Wright, deceased, against Charles D. Smith and others.

The judgment and order of the Trial Term denying a motion for a new trial was reversed by the Appellate Division and a new trial granted.

Right to appeal to Court of Appeals from order of Appellate Division granting new trial in jury cases.—Continued.

The plaintiff recognized the rule so repeatedly laid down by the decisions of this court (Wright v. Hunter, 46 N. Y. 409; Albring v. New York Central & H. R. R. R. Co., 166 N. Y. 287, 174 N. Y. 179), that if the Appellate Division might have reversed on the facts this court cannot review its action, but contends that on the uncontroverted evidence in the case it was entitled to a direction of a verdict in its favor and that, therefore, the Appellate Division was without power to reverse on the facts, and that the order appealed from can be sustained only by showing some error of law. In support of this contention are cited two recent decisions of this court (Otten v. Manhattan Railway Co., 150 N. Y. 395; Hirshfield v. Fitzgerald, 157 N. Y. 166) in which it was held that the Appellate Division cannot create a question of fact by the assertion that it reverses on that ground when the record shows that in reality there is no dispute of facts. To that doctrine we adhere, and, therefore, in any case where the action of the Appellate Division in reversing on the facts is without justification in the record we will reverse its order, provided, however, that in the particular case the order is, under the Constitution and the statute, appealable to this court. This qualification brings us to the first point to be considered on this appeal.

Under the Code of Procedure of 1849 orders granting new trials were

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Don R. Almy, of New York City, for plaintiff-appellant.

George W. Titcomb, of Brooklyn, and *James J. Mahoney* and *George J. Stacy*, both of New York City, for defendant-respondents.

MILLER, J. The order and judgment of the Appellate Division are silent as to the grounds thereof. It must therefore be conclusively presumed that the reversal was not on a question of fact. Section 1338, Code Civil Procedure, as amended by chapter 361 of the Laws of 1912. But this court has repeatedly said that it could not entertain jurisdiction in such a case as this, even though it should conclusively appear that the decision below was based on questions of law only; that it must affirmatively appear that the order denying the motion for a new trial was affirmed on the facts or the appeal therefrom dismissed. *Wright v. Hunter*, 46 N. Y. 409; *Harris v. Burdett*,

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not appealable to this court. (*Duane v. Northern R. R. Co.*, 3 N. Y. 545.) By an amendment in 1851 such appeals were authorized, but by a subsequent amendment in 1852 the right of appeal was taken away. Finally in 1857 an order granting a new trial was made appealable to this court and so the practice remained under both the old Code and the present Code until the adoption of the Constitution of 1895. The power to review such orders granted by the Code was universal and plenary in its terms. But this court early decided that only questions of law (except in a few specified cases) could be reviewed by it and that, hence, when a motion for a new trial had been made in a case tried before a jury and the General Term had reversed the order denying the motion for a new trial, as well as the judgment, the court would not entertain the appeal if it appeared that the General Term might have granted the new trial on questions of fact. Actions tried before the court or a referee were governed by different rules. It was under this condition of procedure that Judge Haight said, with entire accuracy, in *Chapman v. Comstock* (134 N. Y. 509, 512): "The rule is now well settled that an order of the General Term granting a new trial in an action tried before a jury, when there was a conflict of evidence, and the order may have been made upon the facts, is not reviewable in this court unless it appears from the record that the order was

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73 N. Y. 136; Williams v. D. L. & W. R. R. Co., 127 N. Y. 643, 27 N. E. 404; Chapman v. Comstock, 134 N. Y. 509, 31 N. E. 876; Mickee v. W. M. & R. M. Co., 144 N. Y. 613, 39 N. E. 650; Albring v. N. Y. C. & H. R. R. Co., 166 N. Y. 287, 59 N. E. 990; Bank of China v. Morse, 168 N. Y. 458, 61 N. E. 774, 56 L.R.A. 139, 85 Am. St. Rep. 676; Allen v. Corn Exchange Bank, 181 N. Y. 278, 73 N. E. 1026. In the last case cited Chief Judge Cullen reviewed the history of appeals from orders granting new trials.

We do not know how to make language more explicit, and yet the attitude of counsel in this case and the amendment of 1912, said to have been recommended by the State Bar Association, indicate that the subject is not understood by the Bar. The confusion doubtless results from the failure to perceive the

Right to appeal to Court of Appeals from order of Appellate Division granting new trial in jury cases.—Continued.

affirmed as to the facts or the appeal therefrom dismissed." But under the Constitution of 1895 and the amendments of the Code enacted in pursuance thereof, orders granting new trials no longer are generally and as a class appealable to this court, but only those of a specified character, to wit, "orders granting new trials on exceptions." Therefore, to give this court jurisdiction it must first appear that the new trial was granted on exceptions. This was so held by this court in Otten v. Manhattan Railway Company (*supra*) where Judge Vann elaborately discussed the question whether in that particular case the new trial had been granted on an exception or not. That was the case of a judgment entered upon the decision of the court at Special Term. Judge Vann pointed out that the only power of the Appellate Division to entertain an appeal and reverse the judgment, even on a question of fact, was by virtue of the general exception authorized by the Code. He said that, therefore, the case fell within the constitutional provision. But the practice in cases tried before a jury is radically different from that which obtains in cases tried before a court or referee, and this distinction has always prevailed in our jurisprudence. We have had occasion recently to point out this difference in practice and the results that follow from it. (Collier v. Collins, 172 N. Y. 99, 101; Alden v. Knights of Maccabees, 178 N. Y. 535.) Questions of fact in a jury case are not raised by any exception on the trial, but only by a motion for a new trial and an appeal from the order if the motion is denied. (Thurber v. Harlem B., M. & F. R. R. Co., 60 N. Y. 326; Boos

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distinction which still exists between cases at law and in equity. Under the chancery practice the court on appeal granted the judgment which should have been rendered in the first instance, and under the Code of Civil Procedure the Appellate Division is required, on an appeal from a judgment entered on the report of a referee or the decision of the court on a trial without a jury, to review all questions of fact and law, and is empowered to grant the judgment which the facts warrant. Code of Civil Procedure, § 993. A reversal on questions of law only, which is presumed unless the contrary appears, imports that the facts as found by the trial court or the referee are affirmed, and on appeal to this court the questions of law arising on those facts are reviewed. But in jury cases the rule is different. The appeal from the judgment brings up the exceptions only. Code

Right to appeal to Court of Appeals from order of Appellate Division granting new trial in jury cases.—Continued.

v. World M. L. Ins. Co., 64 N. Y. 236.) On an appeal from a judgment alone the Appellate Division is limited to an examination of the exceptions or errors of law exactly to the same extent as is this court; but on a motion for a new trial on the judge's minutes or on a case it is not necessary to authorize a reversal that an exception should appear in the record. None can appear to raise the question of fact and none is necessary to raise questions of law, for on such an application the court may reverse the judgment for errors of law to which no exceptions have been taken. Therefore, it follows that the granting of a new trial on the facts in a case tried before a jury is not an order granting a new trial on exceptions. It is true that in this particular case the defendant did except to certain rulings of the court. But as the Appellate Division has seen fit to award it a new trial on the facts, which part of the order is not reviewable by this court under the provisions of the Constitution and of the Code, it does not become appealable, because in addition thereto the court saw fit to base its order also upon errors of law. In my opinion, under the present limitation of the Constitution, in no case tried before a jury in which a motion for a new trial has been made on the ground that the verdict is against the evidence can we entertain an appeal from the order unless it affirmatively appears that the Appellate Division has affirmed the facts. If it be urged that the Appellate Division has no right to declare a question of fact when there is no question of fact in the case and that such action is an error of law, the answer is that under the Constitution such an

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Civil Procedure, § 1346; *Collier v. Collins*, 172 N. Y. 99, 64 N. E. 787; *Alden v. Knights of Maccabees*, 178 N. Y. 535, 71 N. E. 104. The facts can be reviewed only by an appeal from an order denying a motion for a new trial. *Thurber v. Harlem B., M. & F. R. R. Co.*, 60 N. Y. 326; *Boos v. World Mutual Life Ins. Co.*, 64 N. Y. 236. When the appeal is both from the judgment and an order denying a motion for a new trial the Appellate Division may reverse on the exceptions without passing on the weight of evidence, and in such case, as has often been pointed out, if this court should entertain the appeal and reverse the judgment of the Appellate Division, it would result

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error of law in an action tried by a jury is not reviewable by this court any more than a unanimous determination by the Appellate Division that there is evidence to support a verdict when, in our judgment, there is no such evidence. Recently, in the case of *Reich v. Dyer* (180 N. Y. 107), we did entertain such an appeal on the merits, but, upon consideration, dismissed it on the ground that the case presented a conflict of fact. The objection to the appeal which has now been discussed was overlooked by us, either by inadvertence or by the failure of counsel to properly impress it upon us. However, as the appeal was properly disposed of, the decision has worked no harm, but our action in that case is not a precedent to be hereafter followed.

The appeal should be dismissed, with costs.

§ 1338 of the Code as amended reads as follows:

"Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon the report of a referee, *upon the verdict of a jury or a decision*, or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be *conclusively* presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the *particular question or questions of fact upon which the reversal was made or the new trial was granted are specified and referred to by number or other adequate designation* in the body of the judgment or order appealed from."

The portion in italics was added by the amendment of 1912 and the last clause of the section before amendment read as follows: "Unless the contrary clearly appears in the record body of the judgment or order appealed from."

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in depriving the defeated party of the right which the law gives him to have the facts reviewed by the Appellate Division. With intermediate appellate courts and a final court of law, the practice on appeal is necessarily technical, but the technicalities must be observed to prevent miscarriages of justice. They are not so occult but that they can easily be understood. There is an accurate exposition of the subject in the admirable work of Benjamin N. Cardozo on the jurisdiction of the Court of Appeals. The statute can easily be amended to accomplish the purpose evidently aimed at by those who proposed the amendment of 1912.

The appeal should be dismissed.

CULLEN, C. J., and GRAY, WILLARD BARTLETT,
CHASE, CUDDEBACK, and HOGAN, JJ., concur.

Appeal dismissed.

(Court of Appeals, June, 1913.)

**OSBURN, Appellant, v. ROCHESTER TRUST & SAFE
DEPOSIT CO., Respondent.**

(209 N. Y. 54, 102 N. E. 571. *Mod'g* 152 App. Div. 235, 136 N. Y. Supp. 859.)

1. Wills — Will and codicil as single instrument.

A will and existing codicil are to be regarded as a single and entire instrument for the purpose of determining testamentary intention and disposition.

2. Wills — Revocation of codicil as revocation of will.

A testator may revoke a codicil without destroying his will, where the will is in itself a full and complete instrument, separate from the codicil.

Note. — Revocation of codicil as revocation of will.

After an exhaustive search but two cases have been found, aside from the text case, which can be cited in this note. They are *Matter of Brookman* (11 Misc. 675, 33 N. Y. Supp. 575), and *In re Tyler's Will* (128 N. Y. Supp. 731).

In the *Brookman* case, after the death of the testator, Henry D. Brookman, there was found, among a bundle of canceled and worthless papers, one purporting to be a will dated July 23, 1879, and a codicil dated June 16, 1883. The codicil began on the same sheet of paper upon which the will ended, there being only a short blank space between the end of the will and the beginning of the codicil, and both instruments were securely tied together in one cover. When so discovered the signature of the deceased to such codicil was found to have been erased by being crossed out in ink lines, and with the following memorandum, in the handwriting of the decedent, alongside the canceled signature: "May 20, '92, void, H. D. B." The court in holding that the cancellation or revocation of the codicil revoked the will said: "The question before this court is, did the deceased intend to revoke the will as well as the codicil when he canceled his signature to, and made the memorandum upon, the codicil, and did his action revoke the whole or only a part of the instrument? I have been

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Osborn v. Rochester Trust & S. D. Co.**3. Wills — Modification by codicil — Effect of subsequent revocation of codicil.**

Where a codicil provides for an additional legacy before the creation of the residuary estate as provided in the will, it modifies and revokes the will to that extent, and the will cannot be restored to its original form and tenor simply by the revocation of the codicil.

Appeal from an order of the Appellate Division, Fourth Department.

Action by Sarah A. Osburn against the Rochester Trust & Safe Deposit Co., as executors, impleaded, with others, to set aside the probate of the will of Sarah R. Devenport, deceased.

Albert H. Stearns, of Rochester, for plaintiff-appellant.

Fred C. Goodwin, of Rochester, for defendant-respondents.

HISCOCK, J. This appeal presents the question whether

Revocation of codicil as revocation of will.—Continued.

unable to find any case bearing upon this precise question, but some English cases pass upon the converse of this proposition, and the reasoning therein employed, I think, may be held applicable to this case. Thus, when a testator had destroyed his will, but not the codicil, it was held that the codicil being dependent upon and inseparably blended with the provisions of the will, was revoked also, and that surrounding circumstances must be taken into consideration in solving the question whether the testator intended to revoke the whole or only part of the instrument.

Sir John Nicholl says in *Medlycott v. Assheton*, 2 Addams Ecc. 229-231:

'A codicil is *prima facie* dependent on the will, and the cancelation of the will is an implied revocation of the codicil. But there have been cases where the codicil has appeared so independent of and unconnected with the will that, under circumstances, the codicil has been established though the will has been held invalid. It is a question altogether of intention. Consequently, the legal presumption in this case may be repelled; namely, by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption. The codicil in this case appears connected with

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the destruction and revocation of a codicil to a will necessarily operates as a revocation of the will. It was held at the Trial Term that this was the result. The Appellate Division, however, unanimously held a contrary view.

The question is presented by very simple and entirely undisputed facts. The testatrix duly made and executed a will, and subsequently a codicil, which only modified the former by making an additional bequest of \$1,000 before creating and providing for a residuary estate. Apparently the will and codicil were, physically, detached and separate instruments. Subsequently the codicil was intentionally destroyed, and thereby revoked, but the will was fully preserved, and after the death of the testatrix found in an appropriate place for custody, and duly admitted to probate.

Revocation of codicil as revocation of will.—Continued.

the will, for the principal legatees in the codicil are 'her two trustees,' being such under the will, and, the will being revoked, they no longer retain that character. Even the distribution of the trinkets, made by the codicil, might be influenced by the disposition contained in the will. . . . Under these considerations, I am of opinion that the legal presumption of the codicil, being revoked by the cancellation of the will, is not sufficiently repelled by circumstances showing a different intention in the testatrix, and, consequently, that she must be pronounced to be dead intestate.'

See, also, *Coppin v. Dillon*, 4 Hagg. Ecc. 369; *Schouler*, Wills, § 400: 1 Jarm. Wills, 139; 1 Redf. Wills, 316.

This will and codicil must be taken as one instrument, and both together considered as the will of the deceased. *Brown v. Clark*, 77 N. Y. 369-378; 2 Rev. St. p. 68, § 71; *Birdseye's Rev. St.* 3345. The codicil simply modifies the will in a few particulars, and, as modified in all respects ratifies and confirms it. The codicil, standing alone, as a separate instrument, would utterly fail to make an intelligent or total disposition of this estate, and would not be a legal entity, independent of the existence of the will. The provisions of the codicil are inseparably blended with those of the will, and the act which revoked the codicil must, under the circumstances of this case have been intended to revoke the will also.

There are other circumstances which render it impossible for me to escape from the conclusion that Mr. Brookman intended to revoke the whole instrument. The scheme of the will and codicil was, after providing for the widow, to divide the rest of the estate, as equally as possible, between

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There can be, of course, no dispute concerning the proposition urged by the learned counsel for the appellant that a will and existing codicil are to be regarded as a single and entire instrument for the purpose of determining testamentary intention and disposition. But the further proposition which he in effect urges that a codicil so draws after it and incorporates into itself the will that the former cannot be revoked without also destroying the latter is quite a different one, and in our judgment is sustained neither by reason nor by authority. A will and a codicil are such separate and independent instruments in point of execution that there can ordinarily be no practical objection to the revocation of the codicil alone lest it might furnish some opportunity for fraud or miscarriage of the testator's purpose. While it might often happen that the codicil

Revocation of codicil as revocation of will.—Continued.

his three children; and in carrying out this scheme he devised to each of them a life estate, coupled with certain testamentary powers in valuable parcels of land then owned by him; and one necessity for having any codicil executed was to readjust one child's share, which had declined in value since the making of the will. In the year 1892, shortly before making the memorandum and canceling the signature upon the codicil, the hitherto friendly relations which had existed between the deceased and his brother were sundered, and their business interests were entirely severed. The deceased owned in common with his brother valuable real estate, and, by his said will, he devised his interest in said real estate to one of his daughters, such devise of this interest being most of her share under the will. Thus, in separating and severing his interests from his brother, as a result of their quarrel, he divested himself of the entire real estate which by the will had been devised as the share of this daughter, and the entire scheme of the will was overthrown by this conveyance, and the result, undoubtedly, was to revoke the devise of this child. In other words, as the case stood on the 20th day of May, 1892, when the signature was canceled, the plan of the decedent to specifically devise to each of his three children real estate of the estimated value of \$300,000 or \$400,000 was annulled by the conveyances which had just before that date been executed by him to his brother. One of his three children was in this way, unintentionally, practically disinherited, with no reference to herself, and as a purely accidental consequence of a difference between her father and her uncle; and it was the will, and not the codicil portion of

would be so related to and dependent on the will that it would be impossible to destroy the latter without carrying down the former, the reverse would ordinarily not be true. There would seem to be no good reason why a testator should not be allowed to revoke a codicil, which might be, as in this case, an entirely separate and distinct instrument, without destroying his will, in itself a full and complete instrument.

That these views should prevail is practically determined by authority in this state. In *Matter of Cunnion*, 201 N. Y. 123, 94 N. E. 648, Ann. Cas. 1912A, 834, it appeared that the testator had executed two wills. The later one could not be found after the testator's death, and no evidence was produced concerning its contents. The first will was admitted to probate, and in upholding this disposition it was held in an opinion writ-

Revocation of codicil as revocation of will.—Continued.

the instrument, the plan of which was thus defeated. The will also designated the brother as an executor and trustee, but obviously the testator, having become unable to amicably hold even a piece of real estate in common with his brother, was unwilling to have his brother left in power over his estate and family as an executor or trustee. Yet it was the will, and not the codicil, which would have made the brother executor and trustee. It appears that his relations with all his children were entirely harmonious down to the day of his death, and no reason existed why any discrimination should have been made against any child. He also frequently stated during the last year of his life that he had destroyed his will, and while under the statute, such verbal revocation will not suffice, yet I think it bears upon the question of intent, and should be given some weight under the circumstances.

It would seem, therefore, that the decedent resorted to this act of cancellation with a view to remedy what would otherwise have been a grievous and unintentional inequality between his children. Destruction of the codicil would not have had the least tendency to correct the injustice which the decedent desired to avoid. Cancellation of the entire instrument, being the will modified and reaffirmed by the codicil, furnished a complete remedy. I am of the opinion, therefore, taking into consideration all the circumstances surrounding the act of Mr. Brookman on May 20, 1892, that he intended to revoke the entire instrument, consisting of his will and codicil, and that he died intestate."

There are many features which distinguish the Brookman case from the

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ten by Judge Chase that more than one will may exist at the same time, and that two wills may be construed together if such was the intention of the testator; that under the circumstances disclosed it was the presumption that the testator had destroyed the second will *animo revocandi*; that the later will is not necessarily a revocation of the prior will, unless by it the prior will is in terms revoked and canceled, or by the later will a disposition is made of all of the testator's property, or the same is so inconsistent with the former will that the two cannot stand together, or that the former will is revoked *pro tanto*. Thus it was in effect held that a second will might exist with a former one, and to some extent revoke it, that the two wills if in existence were to be construed together, and that the revocation of the second one did not revoke the first one.

Revocation of codicil as revocation of will.—Continued.

text case; the most noticeable being the fact that in the Brookman case the will and the codicil were both on the same sheet of paper, and after the codicil was revoked by canceling the signature and writing the word "void" thereon, the paper was placed among useless papers by the deceased, showing an intention on the part of the testator to destroy his will as well as the codicil.

In the Tyler case it appeared that subsequent to the date of the will offered for probate in that case, and while the testator was ill, he had a justice of the peace draw a codicil which was attached to the will by the justice. Thereafter and shortly before the death of the testator, he requested his physician to destroy the codicil as the justice who drew it didn't get it right. This the physician did. The court in holding that the destruction of the codicil did not revoke the will said: "It seems to me that the codicil did not change the will in any important respect. It simply tried to confer power on the widow and daughter to sell the farm and divide the proceeds if they could agree. They could have done that without the codicil if they could agree in the matter, and the execution of the codicil was really unnecessary in that particular, and its destruction in the manner testified to did not change the will, much less revoke it. There is no evidence of any revocation clause in this codicil, and its addition to the will did not change it in any material manner, and its destruction left the will as it was, and really as the last will and testament of the testator as he desired it to be. * * * In my view of the case

I fail to see how we can distinguish the present case from the one cited by any real, substantial principle. There is concededly already sufficient uncertainty concerning the construction and probate of wills so that we ought not to introduce some new distinction, unless it is substantial and commended by good reasons.

The codicil in the present case did not occupy any different relationship, nor exercise any greater effect upon the will, than did the second will upon the first one in the Cunnion Case. The codicil simply modified the original will to the extent of a small legacy, just as the second will might have done. It was called a codicil—that is, a “little will”—instead of a will. It so happens, although this is not by any means decisive, that the codicil in this case was just as much an independent instrument physically as was the second will in the Cunnion Case, and if the destruction of the second will, which while existing was related to and necessarily to be construed with the first will, did not operate as a revocation of the latter, there is no reason why the revocation of a codicil should have any such effect.

Beyond this main question there is one minor respect in which we think that the decision of the learned Appellate Division was erroneous, and that is with reference to the effect of the provision in the codicil for a legacy in addition to those

Revocation of codicil as revocation of will.—Continued.

this codicil was really unimportant, as it changed no part of the will. It simply tried to make permissive a sale of the property if desired and the parties could agree. Its existence or destruction worked no material change in the plans of the testator, and to hold in this case that the testator, because he executed this codicil and then destroyed it, by that means actually revoked and set aside and rendered null and void his former will, or, in other words, he died without leaving a will at all, is going further than any case should go, and certainly further than any case to which my attention has been called, which applies to this state of facts.”

The facts in the Tyler case were similar to those in the text case except that in the Tyler case the codicil made no change in the provisions of the will, whereas in the text case the codicil made a bequest not mentioned in the will.

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mentioned in the will. When the codicil modified the will by providing for an additional legacy before creation of the residuary estate, it modified and revoked the will to that extent. This revocation was consummated at the moment when the codicil was executed and published, and thereafter the will was to that extent annulled. After this revocation had thus been consummated by the execution of the codicil, the will could not be restored to its original form and tenor simply by the revocation of the codicil. A revocation of the revocation could not thus be accomplished. The effect of this is that the testatrix died intestate as to \$1,000.

It seems to be plain and to be assumed that the evidence in the action could not be changed on another trial. Therefore, instead of directing a new trial, the Appellate Division should have awarded final judgment in favor of defendant, sustaining the validity of the probate of the will except as to the sum of \$1,000 mentioned in the codicil, and as to which sum it should have adjudged distribution as in case of intestacy. It having failed to do this, such judgment should be rendered by this court, without costs in any court to either party.

CULLEN, C. J., and WERNER, CHASE, COLLIN, and HOGAN, JJ., concur. WILLARD BARTLETT, J., concurs in result.

Judgment accordingly.

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A.

ACTIONS.

Action against druggist for sale of poison,—see DRUGGISTS, 2.
In what capacity suit by executor or administrator must be brought,—see EXECUTORS AND ADMINISTRATORS, 1, 2.

1. *Splitting cause of action.*—Where several sums or instalments are due upon a single contract, they must all be united in one action, the plaintiff cannot split up the cause of action by suing for some instalments and reserving others which are already due for future action. *Simon v. Bierbauer*, 189.

APPEAL AND ERROR.

Unanimous affirmance by appellate division in criminal case,—see CRIMINAL LAW, 18.

When refusal to charge in precise language of request is not error,—see INSTRUCTIONS, 1.

1. *Duty of Court of Appeals to examine evidence when Appellate Division decision not unanimous.*—Where the decision of the Appellate Division affirming a judgment for the plaintiff is not unanimous, it is the duty of the Court of Appeals to ascertain if there is proof permitting the jury to return a verdict in favor of the plaintiff. If there is no such evidence tending to support the verdict, the submission of the case to the jury was

error. *Haskell v. Auburn Light, Heat & Power Co.*, 223.

2. *Court of Appeals—Jurisdiction—Appeal from order reversing judgment and order denying motion for new trial.*—The Court of Appeals has no jurisdiction of an appeal from an order of the Appellate Division reversing a judgment and order denying a motion for a new trial, when the Appellate Division is silent as to the grounds of reversal, because when the appeal is both from the judgment and an order denying a motion for a new trial the Appellate Division may reverse on the exceptions without passing on the weight of evidence, and if the Court of Appeals should entertain the appeal and reverse the judgment of the Appellate Division it would result in depriving the defeated party of the right which the law gives him to have the facts reviewed by the Appellate Division. *Wright v. Smith*, 489.

3. *Remittitur—Amendment.*—In a proceeding for the judicial settlement of an executor-trustee's account, a remittitur will be amended on appeal at the instance of the trustee so as to recite the appearance on the appeal of the remaindermen and their consent to be bound by the judgment therein. *Matter of Osborne*, 177.

4. *Statement of grounds of objection—Appeal.*—While the grounds of an objection should not be stated at inordinate length, they should be clearly and fully specified to make the objection available on appeal. *People v. Cummins*, 93.

5. *Constitutional objection to evidence—Necessity for specifying.*—The court on appeal will not deem that the constitutional objection that the evidence would incriminate the witness was taken in any instance except where it was expressly brought to the attention of the trial court, although the trial court erred in stating to counsel that it was not necessary to state at length the ground of his objection, when he attempted to state the ground of objection after previously objecting to the materiality and relevancy of the evidence, where continually in subsequent parts of the examination counsel specified the grounds of the objections interposed. *People v. Cummins*, 93.

ASSIGNMENTS.

Check as assignment,—see **BILLS AND NOTES**, 1.

1. *Assignment of contingent estate.*—Under Real Property Law, §§ 36, 40, 59, which divides expectant estates into future estates and reversions, and provides that a future estate is contingent "while the person to whom or the event on which it is limited to take effect remains uncertain," and that an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession," there is no distinction between uncertainty of person and uncertainty of event with respect to the alienability of contingent interests. *Clowe v. Seavey*, 343.

ATTORNEYS.

Misconduct of district attorney on trial of case,—see **CRIMINAL LAW**, 5, 6, 15, 16.

AUTOMOBILES.

See **MOTOR VEHICLES**.

B.

BANKRUPTCY.

1. *Contingent estate—Passes to trustee.*—Under Real Property Law,

§§ 36, 40, 59, which divides expectant estates into future estates and reversions, and provides that a future estate and reversions, and provides that a future estate is contingent "while the person to whom or the event on which it is limited to take effect remains uncertain," and that "an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession," the interest of a bankrupt in the estate of her grandfather is alienable and passes to her trustee in bankruptcy, where such interest is created by a testamentary provision that "in the event of the death of my said son, and the remarriage of his said wife, should she survive him, I desire and direct my said trustees to pay to my said grandchildren, lawful children of my son, or their descendants, all the estate hereby devised to my son and his children as aforesaid." *Clowe v. Seavey*, 343.

2. *Fraudulent transfer—Transferee's intent.*—A person cannot put his property beyond the reach of his creditors by a transfer which secures it to himself and his children, even though the transferee had no intent to hinder, delay or defraud the creditors of the transferor. *Clowe v. Seavey*, 343.

BANKS AND BANKING.

1. *Death of drawer of check—Effect of payment without notice.*—Although the power of a bank to pay a check is revoked by the death of the drawer, a bank is not liable for the amount of the check paid after the death of the drawer without notice of such death. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

BILLS AND NOTES.

Liability of bank for payment of check without notice of death of drawer,—see **BANKS AND BANKING**, 1.

1. *Check as assignment—Revocation.*—A check of itself is a mere order for the payment of money not operating as the assignment of any

part of the funds, the authority of the drawee or the banker to pay which may be revoked or countermanded by the drawer. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

2. *Authority of agent to collect check—Revocation by death of principal.*—The death of the principal revokes the authority of the agent to collect the check. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

3. *Draft—Right to recover back moneys paid.*—The drawee of a draft who has paid the same to a bona fide holder for value relying in part upon purported bills of lading attached by the drawer of the draft, but not mentioned therein, cannot, on discovery that the bills of lading are forgeries, recover back the moneys so paid from the payee or indorsee who has neither guaranteed the genuineness of said instruments nor been aware of their fraudulent character, as the mere attachment of bills of lading to a draft does not make the former a part of the latter, and one who accepts or pays such a draft must be assumed in the absence of special circumstances to do so on the faith of the draft itself. *Springs v. Hanover National Bank*, 370.

4. *Draft—Attached bills of lading.*—A draft, because it has the word "cotton" printed thereon, has no such reference to bills of lading attached thereto as to imply that the draft was conditional or drawn against such purported shipments of cotton. *Springs v. Hanover National Bank*, 370.

BILLS OF LADING.

Effect of attaching bills of lading to draft,—see **BILLS AND NOTES**, 1, 2.

BOUNDARIES.

1. *Highway—When included in conveyance of abutting land.*—Where property is described as a certain subdivision as laid down upon a certain map, and such map shows the property as abutting at

its southerly boundary on a road four rods wide which road in turn has for its southerly boundary the blue line of the enlarged Erie canal, such description includes the land to the center of the highway, but does not include the entire highway. *Geddes Coarse Salt Co. v. Niagara, Lockport & Ontario Power Co.*, 257.

2. *Center line of highway as boundary—Reference to map.*—The general rule is that a conveyance by reference to a map which shows the premises being conveyed as abutting upon a highway as between grantor and grantee conveys to the latter title to the fee of the highway to the center line thereof. This is the rule as against the state as well as against a private grantor. *Geddes Coarse Salt Co. v. Niagara, Lockport & Ontario Power Co.*, 257.

3. *Non-accepted highway as boundary.*—A grant of property by reference to a map which shows the premises abutting upon a highway, conveys title to the fee of the highway to the center line thereof, even though at the time of the conveyance the highway as shown upon the map has not been accepted and used by the public as such. *Geddes Coarse Salt Co. v. Niagara, Lockport & Ontario Power Co.*, 257.

4. *Center line of highway as boundary—Amount of acreage as affecting.*—Where property is conveyed by reference to a map which shows the premises conveyed as abutting upon a highway, the fee of the highway to the center line thereof is conveyed, even though the grant by its terms or by reference to a map gives an area of the premises being conveyed which is satisfied without resort to the land included in the highway. *Geddes Coarse Salt Co. v. Niagara, Lockport & Ontario Power Co.*, 257.

5. *Highway—Interpretation favorable to grantee.*—The language of a conveyance which bounds and describes lands by reference to a public highway is to be interpreted most favorably in favor of the grantee, and under ordinary circumstances, where the conveyance is of a lot abutting on a highway or

where the descriptive lines run to or along such highway, the presumption is of an intent on the part of the grantor to convey title to the center of the highway. This presumption, however, must yield to language which shows an intent on the part of the grantor to exclude from his conveyance title to the bed of an abutting street and to limit such title to the exterior lines hereof. *Matter of Parkway*, 262.

6. *Corner lot on highway—Place of beginning.*—Where property is described as beginning at the northwesterly corner of a certain street and avenue as laid down on a map, the corner formed by the exterior lines of the street and avenue and not the intersection of their center lines is meant. *Matter of Parkway*, 262.

7. *Starting point—Importance of.*—The starting point in a description of land bounded by a highway is of great importance, and while its effect is not conclusive but must yield where it is inconsistent with other lines in the description, nevertheless it must control the other parts of the description, at least in the absence of some irreconcilable inconsistency. *Matter of Parkway*, 262.

8. *Highway—When excluded from conveyance of abutting land.*—Title to the bed of the street is excluded by a description which reads: "Beginning at the northwesterly corner of Walnut street and Second avenue as laid down on said map (previously mentioned); thence running westerly along said street fifty feet; thence northerly parallel with said avenue one hundred feet; thence easterly parallel with said street fifty feet to said avenue; thence southerly along said avenue one hundred feet to the corner aforesaid and place of beginning." *Matter of Parkway*, 262.

BROKERS.

Limitation of rights of insurance brokers,—see *INSURANCE*, 1.

C.

CARRIERS.

1. *Carriers of goods—Amount of liability—Limitation by contract fixing rate.*—A contract between carrier and shipper fixing the value of the goods shipped for the purpose of determining the rate of charge and the liability of the carrier in case of loss or damage concludes the shipper, though the loss or damage is due to negligence. *Boyle v. Bush Terminal Railroad Co.*, 405.

CODE.

—CRIMINAL PROCEDURE.

§ 542,—see *CRIMINAL LAW*, 17.

CONSTITUTION.

Art. 1, § 6,—see *STATUTES*, 3.

CONSTITUTIONAL LAW.

Constitutionality of statute limiting right of one to conduct business of insurance broker,—see *INSURANCE*, 1.

Constitutionality of statute requiring person to leave name, etc., in case of accident,—see *STATUTES*, 3.

When unconstitutionality of part of statute affects whole,—see *STATUTES*, 1.

CONTRACTS.

Contract between carrier and shipper fixing damages for loss as concluding shipper,—see *CARRIERS*, 1.

Necessity for mutual participation in act validating verbal contract for sale of goods under statute of frauds,—see *STATUTE OF FRAUDS*, 1, 2.

Stipulations on telegraph blank as contract between company and sender of message,—see *TELEGRAPHS AND TELEPHONES*, 2.

CORPORATIONS.

For matters in reference to public service corporation,—see **PUBLIC SERVICE CORPORATIONS.**

Apportionment of dividends upon stock as between life beneficiary and remaindermen,—see **TRUSTS**, 1, 2.

Right to dividend upon stock held in trust,—see **ESTATES; LIFE ESTATES**, 1, 3, 4.

COSTS.

When costs taxed against representative in individual capacity,—see **EXECUTORS AND ADMINISTRATORS**, 2.

COURTS.

Duty of Court of Appeals to examine evidence when Appellate Division decision is not unanimous,—see **APPEAL AND ERROR**, 1.

Jurisdiction of Court of Appeals of an appeal from an order of the Appellate Division reversing a judgment and order denying a motion for a new trial, when the Appellate Division is silent as to the grounds of reversal,—see **APPEAL AND ERROR**, 2.

1. *Consistency of legal principles.*—A rule of conduct of a whole people long prevailing and acted upon should not be subordinate to mere consistency of legal principles. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

CRIMINAL LAW.

Confession of accomplice as corroborating evidence,—see **WITNESSES**, 1.

1. *Attempt to escape—Evidence.*—The mere participation of a new prisoner in the fashioning of a possible instrument of escape which previous inmates of the jail had begun to construct before his advent, cannot be regarded as evidence of the guilt of such new prisoner within the rule which permits an inference of guilt from an

attempt to escape arrest or incarceration. *People v. Harris*, 205.

2. *Evidence — Admissibility.*—Where, on the trial of a man charged with murder in the first degree, the defense is that accused, enraged at his wife's confession of adultery, shot her in the heat of passion without deliberation or premeditation, evidence to show that the condition of the wife's clothing indicated that menstruation had not ceased at the period to which her alleged declaration referred, and to show that an examination of the uterus showed that the wife was not pregnant at the time of her death, is inadmissible. *People v. Harris*, 205.

3. *Conviction—Must be by legal evidence.*—A defendant, charged with a criminal offense, must be prosecuted according to the forms of law and his guilt must be established, if at all, by legal evidence, no matter what his origin, his station in life, or his associations may have been, and no matter what other offenses he may have committed. *People v. Pettanza*, 86.

4. *Kidnapping — Evidence.*—On the trial of an indictment charging the defendant with kidnapping, it is error to allow proof that the defendant's sister was concerned in another kidnapping case, where there is no evidence tending to show that there was any connection between the two cases. *People v. Pettanza*, 86.

5. *District Attorney—Misconduct of—Presenting improper evidence.*—It is grossly improper for the district attorney on the trial of an indictment for kidnapping to call a six-year old boy on the pretense of proving "certain conditions" by him, and then to prove by him that the defendant's sister was concerned in the commission of an unrelated, but similar, crime. *People v. Pettanza*, 86.

6. *Kidnapping — Evidence—Misconduct of District Attorney.*—Evidence to show that the defendant, on trial for kidnapping, unlawfully had dynamite in his possession, an offense with which he was not charged, is inadmissible; and where

the district attorney persists in exhibiting the dynamite and examining a witness to prove that it was found in the defendant's room, such conduct will not be disregarded on appeal. *People v. Pettanza*, 86.

7. *Kidnapping — Evidence.*—On the trial of an indictment for kidnapping, it is error to allow the district attorney to show, over objection and exception, that the defendant was acquainted with a man of the same nationality, whose picture was in the "Rogues Gallery," and who had sent Black Hand letters and committed other misdeeds. *People v. Pettanza*, 86.

8. *Third degree—Meaning.*—The expression of putting a person "through the third degree" has come to mean, commonly speaking, that he has been subjected to an extended and severe questioning, perhaps almost cruel in its rigor, at the hands of the police authorities, to elicit material facts, which are deemed to be within his knowledge. *Demos v. New York Evening Journal Pub. Co.*, 393.

9. *Similar crimes or acts—Evidence of—Admissibility of to show guilty knowledge.* When guilty knowledge, quite commonly called intent, is an essential ingredient of the crime charged, evidence is admissible of similar crimes or acts committed or attempted at or about the same time by the person charged. *People v. Katz*, 315.

10. *Similar transaction with other men—Evidence of their indictment or conviction—Competency on question of defendant's guilty knowledge.*—Evidence that some of the men with whom the defendant had previously been engaged in other business dealings had either been indicted or convicted of the crimes, is competent for the purpose of proving the defendant's previous connection with other similar transactions through the agency of men whose reputations, no less than the character of the transactions, were important factors in determining whether the defendant was a victim or a conspirator. *People v. Katz*, 315.

11. *When party is accomplice—Question for jury.*—Where, on the trial of one of several who have been implicated in a criminal transaction, there is no direct evidence that a certain witness knew anything about the criminal plot which underlay the transaction, it is for the jury to decide, under proper instructions on the law, whether the witness was a guilty accomplice or an innocent participant. *People v. Katz*, 315.

12. *When party is accomplice—Question for jury.*—Where, on the trial of one of several who have been implicated in a criminal transaction, it cannot be said beyond peradventure that a certain witness must have known of the criminal purpose of some of the accomplices, it is not error for the court to refuse to charge as matter of law that the witness was an accomplice. *People v. Katz*, 315.

13. *Instructions—Testimony of accomplice—Weight to be given.*—A charge of a trial court, in referring to the rule which requires corroboration of the testimony of an accomplice, that when such testimony is corroborated by witnesses who appear to be honest and truthful it "becomes testimony of such an order as entitles you to give it great consideration, notwithstanding the fact that it is the testimony of an accomplice," is a fair and conservative statement of the law. *People v. Katz*, 315.

14. *Statement of witness as to previous testimony before Grand Jury.*—Evidence of a witness that he had previously testified before the grand jury on the same matter as at the trial, is not prejudicial, where he is not allowed to testify that his testimony before the grand jury was the same as that at the trial. *People v. Katz*, 315.

15. *Misconduct of District Attorney—Opening address.*—It is not legal error to refuse to instruct the jury at the close of the district attorney's opening address that such address should not be confounded with the evidence and that the district attorney's duty in opening the case was simply to state what he in-

tended to prove, where no particular passage of the address is pointed out as objectionable or unwarranted, and the request is not subsequently renewed. *People v. Cummins*, 93.

16. *Misconduct of District Attorney—Address to jury.*—While mere vituperation can never receive judicial sanction, it cannot be complained that the district attorney, upon the trial of an indictment for stealing \$140,000, called the defendant a thief. *People v. Cummins*, 93.

17. *Application of Code Crim. Proc. § 542 to defendant—Unfair trial.*—Code Crim. Proc. § 542 which provides that "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties," has no application in behalf of an appellant in a criminal case in the court of appeals, where the only questions which can be considered (except in capital cases) are questions of law raised by exceptions. And in the absence of such exceptions the court cannot interfere with the judgment on the ground that the defendant has not had a fair trial. *People v. Cummins*, 93.

18. *Appeal—Unanimous affirmation—Assumption of evidence.*—Where there is an unanimous affirmation by the Appellate Division the Court of Appeals is obliged to assume that there was evidence bearing upon the commission of the crime as charged in each count of the indictment. *People v. Cummins*, 93.

19. *General verdict—Bad counts—Effect.*—A conviction under a general verdict is not rendered erroneous by the presence of bad counts in an indictment provided some of the counts are good. *People v. Cummins*, 93.

20. *Statement of grounds of objection—Appeal.*—While the grounds of an objection should not be stated at inordinate length, they should be clearly and fully specified to make the objection available on appeal. *People v. Cummins*, 93.

21. *Appeal—Constitutional objection to evidence—Necessity for*

specifying.—The court on appeal will not deem that the constitutional objection that the evidence would incriminate the witness was taken in any instance except where it was expressly brought to the attention of the trial court, although the trial court erred in stating to counsel that it was not necessary to state at length the ground of his objection, when he attempted to state the ground of objection after previously objecting to the materiality and relevancy of the evidence, where continually in subsequent parts of the examination counsel specified the grounds of the objections interposed. *People v. Cummins*, 93.

D.

DEATH.

Death of drawer as not affecting payment of check by bank without notice thereof,—see *BANKS AND BANKING*, 1.

Death of principal as revocation of agency,—see *PRINCIPAL AND AGENT*, 1.

1. *Bills and Notes—Authority of agent to collect check—Revocation by death of principal.*—The death of the principal revokes the authority of the agent to collect check. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

DEBTOR AND CREDITOR.

1. *Bankruptcy — Fraudulent transfer—Transferee's intent.*—A person cannot put his property beyond the reach of his creditors by a transfer which secures it to himself and his children, even though the transferee had no intent to hinder, delay or defraud the creditors of the transferor. *Clowe v. Seavey*, 343.

DEEDS.

Conveyance as including highway to center,— see *BOUNDARIES*, 1, 2, 3, 4, 5, 6, 7, 8.

DEFINITIONS.

"Going value,"—see *PUBLIC SERVICE CORPORATIONS*, 2.

Gross negligence,—see *NEGLIGENCE*, 1.

"Permanent incapacity" as a ground for dissolution of partnership,—see PARTNERSHIP, 3.

Third degree,—see CRIMINAL LAW, 8.

DIVIDENDS.

Method of apportioning extraordinary dividends between life tenant and remaindermen, — see TRUSTS, 1.

Right to dividend upon stock held in trust,—see ESTATES, — LIFE ESTATES, 1, 3, 4.

What may be considered in apportioning dividends between life tenant and remaindermen,—see TRUSTS, 2.

DRUGGISTS.

1. *Retail druggist selling as manufacturer — Liability—Public Health Law.*—A corporation of retail druggists, which purchases a patent or proprietary medicine from the manufacturer thereof, and sells the same in the original package but under a label designating it and not the real manufacturers as the manufacturers thereof, is liable by reason of such representation, for any injury suffered by a purchaser of such medicine if the medicine contain an injurious substance instead of being purely vegetable as declared by the label, and such corporation cannot avail itself of the benefit of the exception contained in subdivision two of § 235 of the Public Health Law, which, after declaring that every retail druggist shall be held responsible for the quality and strength of the drugs he sells, except "those sold in original packages of the manufacturer and those articles or preparations known as patent or proprietary medicines." *Willson v. Faxon, Williams & Faxon, 180.*

2. *Sale of poison—Cause of action—Evidence of negligence—Necessity for.*—Where the basis of an action is the sale of a poison to a person who called for a harmless drug, evidence of negligence is necessary in order to make out a cause

of action. *Willson v. Faxon, Williams & Faxon, 180.*

3. *Liability—Sale of poison—Ordinary care—What constitutes.*—The negligence which must be established to render a druggist liable for the sale of a poison to one who called for a harmless drug, is measured by his duty; and while this is only to exercise ordinary care, such care means the highest practical degree of prudence, thoughtfulness and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business. *Willson v. Faxon, Williams & Faxon, 180.*

4. *Sale of harmful medicine—Action—Evidence of negligence.*—In an action against a druggist to recover damages for selling *Kascara Kathartics*, a medicine containing an injurious substance, when a harmless drug was called for, negligence can be predicated of the action of the druggist's agent in selling the medicine upon the false representation that the druggist was the manufacturer, without having taken any other or further means to ascertain the true character of the compound than that it was similar to *Cascarets*, the composition of which was also unknown to the agent. *Willson v. Faxon, Williams & Faxon, 180.*

5. *Manufacturing druggist—Sale of injurious medicine—Liability.*—Where the contents of a medicine are concealed from the public generally and the manufacturer knows the contents and sells the medicine recommending its use for indicated maladies and prescribing the mode in which it shall be taken and an injury is thereby caused to a purchaser thereof, the manufacturer is liable to such purchaser for the injury he has suffered. *Willson v. Faxon, Williams & Faxon, 180.*

E.

EQUITY.

Court of Equity's supervision of trust fund,—see ESTATES—LIFE ESTATES, 2.

Power of Court of Equity to decree dissolution of partnership,—see **PARTNERSHIP, 2.**

ESTATES.

Method of apportioning extraordinary dividends as between life tenant and remaindermen,—see **TRUSTS AND TRUSTEES, 1.**

What may be considered in apportioning dividends as between life tenant and remaindermen,—see **TRUSTS AND TRUSTEES, 2.**

When contingent estate of bankrupt passes to trustee,—see **BANKRUPTCY, 1.**

1. *Life estates—Stock held in trust—Dividend upon—Who entitled to—Intent of maker.*—In determining who is entitled to a dividend upon stock held in trust, the intention of the testator or the maker of the trust must be carried out when such intent is clear, so far as such intent does not result in an unlawful accumulation of income. *Matter of Osborne, 134.*

2. *Life Estates—Supervision of Court of Equity.*—The integrity of a trust fund and the rights of the life beneficiary under the trust should each be considered, determined, and preserved by a court of equity. *Matter of Osborne, 134.*

3. *Life Estates—Ordinary stock dividends—Who entitled to.*—Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. *Matter of Osborne, 134.*

4. *Life Estates—Extraordinary stock dividends—Who entitled to.*—Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such

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a way as to preserve the integrity of the trust fund. *Matter of Osborne, 134.*

5. *Vested remainders.*—The law favors the vesting of remainders. *Cammann v. Bailey, 232.*

6. *Assignment of Contingent estate.*—Under Real Property Law §§ 36, 40, 59, which divides expectant estates into future estates and reversions, and provides that a future estate is contingent "while the person to whom or the event on which it is limited to take effect remains uncertain," and that an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession," there is no distinction between uncertainty of person and uncertainty of event with respect to the alienability of contingent interests. *Clowe v. Seavey, 343.*

EVIDENCE.

Admissibility of evidence as to attempt to escape,—see **CRIMINAL LAW, 1.**

Admissibility of evidence of similar crimes,—see **CRIMINAL LAW, 9.**

Admissibility of evidence that accused's sister was concerned in similar crime,—see **CRIMINAL LAW, 4 & 5.**

Admissibility of evidence to show improbability of statement credited to deceased by accused,—see **CRIMINAL LAW, 2.**

Admissibility of evidence to show that accused was acquainted with one whose picture was in the "Rogues Gallery,"—see **CRIMINAL LAW, 7.**

Admissibility of evidence to show that accused was guilty of an offense with which he was not charged,—see **CRIMINAL LAW, 6.**

Burden of proof in action to procure dissolution of partnership on ground of partner's incapacity,—see **PARTNERSHIP, 5.**

Competency of evidence to show that defendant's business friends had been indicted or convicted of other crimes, — see **CRIMINAL LAW, 10.**

Confession of accomplice as corroborating evidence,—see WITNESSES, 1.

Duty of court of appeals to examine evidence when Appellate Division decision is not unanimous,—see APPEAL AND ERROR, 1.

Evidence as to motive in homicide cases,—see HOMICIDE, 2.

Evidence of negligence in action against druggist for sale of poison or injurious medicine,—see DRUGGISTS, 2, 3, 4.

Necessity of establishing guilt of accused by legal evidence,—see CRIMINAL LAW, 3.

Weight to be given testimony of accomplice,—see CRIMINAL LAW, 13.

1. *Declaration of injured person—Res gestae.*—A declaration made by one who has been injured, in response to a question as to what has happened, which is not spontaneous but distinctly narrative, is inadmissible as part of the *res gestae*. *Greener v. General Electric Co.*, 117.

2. *Statement of witness as to previous testimony before Grand Jury.*—Evidence of a witness that he had previously testified before the grand jury on the same matter as at the trial, is not prejudicial, where he is not allowed to testify that his testimony before the grand jury was the same as that at the trial. *People v. Katz*, 315.

3. *Witnesses—Credibility—Previous conviction—Opinion of trial judge qualifying effect of—Admissibility.*—The opinion of a trial judge, expressed when he was imposing sentence, that neither he nor the jury regarded the defendant as a criminal or a person of criminal tendencies, is not admissible to qualify the effect of a previous conviction upon the credibility of a witness. *People v. Cummins*, 93.

EXECUTORS AND ADMINISTRATORS.

1. *Executors and Administrators—Suit by—In what capacity.*—Although the proper form of action on a cause of action arising out of the administration of the estate is

by the personal representative individually, basing his right and title on his letters of administration or letters testamentary, yet he may sue either individually or in his representative capacity, because, no matter in which capacity a recovery is had, it becomes assets of the estate for which he is accountable, and it does not concern the defendant, whose liability is individual in any event so that the form of judgment is necessarily the same. *Leavitt v. Jas. F. Scholes Co.*, 433.

2. *Executors and Administrators—Suit by—Costs—Taxed against in individual capacity.*—Where a cause of action accrues to the personal representatives of the decedent, as distinguished from a cause of action which accrued to the decedent, whether the personal representative prosecutes the action in his name individually or in his representative capacity, it is to be deemed, for the purpose of the taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he be unsuccessful, the costs may be taxed against him individually without an application to the court. *Leavitt v. Jas. F. Scholes Co.*, 433.

F

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

G

GAS.

Gas company—What considered in rate making,—see PUBLIC SERVICE CORPORATIONS, 5.

GRAND JURY.

Admissibility of evidence that witness had previously testified before Grand Jury,—see EVIDENCE, 2.

GUARDIAN AND WARD.

Imputation of negligence of guardian to ward,—see INFANTS, 2.

H

HIGHWAYS.

Center line of highway as boundary,—see BOUNDARIES, 1, 2, 3, 4, 5, 6, 7, 8.

Construction and constitutionality of § 290, subd. 3 of the Highway Law,—see STATUTES, 2 & 3.

1. *Motor vehicles upon—Legislative power.*—The Legislature may prohibit altogether the use of motor vehicles upon the highways or streets of the state. *People v. Rosenheimer*, 72.

HOMICIDE.

1. *First degree murder—Premeditation and deliberation—Time required for.*—Where six attempts are made to discharge a revolver into the body of another, the time which must elapse between the first and the sixth effort is a sufficient period within which deliberation is possible. *People v. Harris*, 205.

2. *Motive — Evidence.*—On the trial of a man charged with the murder of his wife, evidence of mere temporary intimacy with a prostitute is inadmissible for the purpose of establishing the absence of affection for the wife and a motive for getting rid of her, particularly where such intimacy has existed at a time when the husband and wife are voluntarily living apart. *People v. Harris*, 205.

3. *Evidence — Admissibility.* — Where, on the trial of a man charged with murder in the first degree the defense is that accused, enraged at his wife's confession of adultery, shot her in the heat of passion without deliberation or premeditation, evidence to show that the condition of the wife's clothing indicated that menstruation had not ceased at the period to which her alleged declaration referred, and to show that an examination of the uterus showed that the wife

was not pregnant at the time of her death, is inadmissible. *People v. Harris*, 205.

I

INDICTMENTS AND INFORMATION.

1. *Demurrer to indictment.*—A demurrer must lie if at all to the whole of an indictment. *People v. Rosenheimer*, 72.

2. *Indictment for larceny—Proof of aiding and abetting—Penal Law, § 2.*—A court in an indictment charging defendant with feloniously stealing, taking, and carrying away the property described, is sufficient to permit proof that the defendant aided and abetted others in the consummation of a conspiracy to commit larceny, as under Penal Law, § 2, "a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime is a principal." *People v. Katz*, 315.

INFANTS.

1. *Contributory negligence—Sui juris.*—A boy fourteen years of age is deemed to be *sui juris*. *Jacobs v. H. J. Koehler Sporting Goods Co.*, 16.

2. *Negligence of—Non sui juris—Imputed negligence.*—An infant of tender years is incapable of personal negligence and is deemed to be *non sui juris*; but the negligence of its parents or guardian may be imputed to it. *Jacobs v. H. J. Koehler Sporting Goods Co.*, 16.

3. *Negligence of—Sui juris—Degree of care required of infant.*—Children who are *sui juris* are responsible for their failure to exercise reasonable care for their own protection but are not required to exercise the degree of care required of an adult. They are only required to exercise the degree of care ex-

pected from one of their years.
Jacobs v. H. J. Koehler Sporting Goods Co., 16.

INSTRUCTIONS.

Instruction of court as to weight of testimony of accomplice,—see **CRIMINAL LAW**, 13.

Practice of permitting general exception to refusal to charge mass of requests,—see **PRACTICE AND PROCEDURE**, 1.

1. *Request—Precise language of.*—Where the charge is full and fair, a refusal to charge in the precise language of a request is not error. *People v. Katz*, 315.

INSURANCE.

1. *Broker—Statutory limitation of right—Constitutionality.*—§ 142 of the Insurance Law, which provides that no person, partnership, association or corporation shall act as insurance broker or receive commissions or compensation for doing insurance business without first procuring a certificate of authority so to act from the superintendent of insurance, and before any such certificate shall be issued there must be filed in the superintendent's office a written application therefore setting forth that the applicant is engaged or intends to engage, in good faith, principally in the insurance business or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business, is unconstitutional as it arbitrarily interferes with a citizen's business pursuits, and, by unreasonable discrimination, deprives him of that equal opportunity which the Constitution guarantees. *Hauser v. North British & Mercantile Ins. Co.*, 1.

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Motion for judgment on pleadings,—see **MOTIONS**, 1.

1. *Judgment by default—Effect on counterclaim.*—The dismissal of defendant's counterclaim on rendering judgment for the plaintiff on defendant's default does not thereafter prevent the defendant from recovering on it. *Simon v. Bierbauer*, 189.

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Misconduct of district attorney in kidnapping case,—see **CRIMINAL LAW**, 5 & 6.

1. *Evidence.*—On the trial of an indictment charging the defendant with kidnapping, it is error to allow proof that the defendant's sister was concerned in another kidnapping case, where there is no evidence tending to show that there was any connection between the two cases. *People v. Pettanza*, 86.

L

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1. *Legislative power—Motor vehicles—Highways.*—The Legislature may prohibit altogether the use of motor vehicles upon the highways or streets of the state. *People v. Rosenheimer*, 72.

LIBEL AND SLANDER.

1. *Whether publication is defamatory—As question for jury.*—In an action for libel it is for the jury to determine in a case of doubtful meaning, whether the tenor and import of the publication are offensive and defamatory and whether it could be so understood by the general public, or in the plaintiff's neighborhood. *Demos v. New York Evening Journal Pub. Co.*, 393.

2. *Whether publication is defamatory—As question for jury.*—Where a published article relating to the possible culpability of two men who were held upon suspicion of being concerned in a homicide, recites that a certain witness, naming him, was brought before the police captain and put through the third degree, which brought out the fact that the two men who were under arrest tried to hire him to commit the murder; and in a libel action based on such article the plaintiff alleges, by way of innuendo, that the article charged that he was an intimate associate of criminals and murderers that he could be induced by money to commit murder, that he had concealed his knowledge of facts relating to the murder until compelled to disclose it, and that it charged him with moral delinquency and failure to perform his duties as a citizen, thereby exposing him to ridicule, contempt, etc., to the injury of his character and business; it is for the jury to decide whether the article could be understood according to the meaning put upon it by the plaintiff. *Demos v. New York Evening Journal Pub. Co.*, 393.

LICENSES.

1. *Telephone company using power company's pole as licensee.*—Where a pole erected in the street is the private property of a power company, and a telephone company attaches its wires to the pole without any especial arrangement or agreement or without any specific consent on the part of the power company, but where the power com-

pany for a long period of time knows of and passively acquiesces in the location of the telephone wires on its pole, the relation of the telephone company to the power company is that of a licensee, as to the purpose for which it used the pole. *Heskell v. Auburn Light, Heat & Power Co.*, 223.

2. *Employee of telephone company using power company's pole as licensee—Duty of power company toward such employee.*—The employee of a telephone company which has attached its wires to the pole of a power company without agreement, but without objection, is a mere volunteer or naked licensee in going upon or using the pole, and the power company owes him the sole duty of abstaining from inflicting intentional or wanton or wilful injury, as he uses the pole subject to all the concomitant conditions and perils. *Heskell v. Auburn Light, Heat & Power Co.*, 223.

M

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1. *Exclusion from highway—Power of Legislature.*—The Legislature may prohibit altogether the use of motor vehicles upon the highways or streets of the state. *People v. Rosenheimer*, 72.

N

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Delay in delivery of telegram as negligence,—see *TELEGRAPHS AND TELEPHONES*, 5.

Evidence of negligence in action against druggist for sale of poison or injurious medicine,—see *DRUGGISTS*, 2, 3, 4.

Failure of telegraph operator to confirm message as gross negligence,—see *TELEGRAPHS AND TELEPHONES*, 8.

Gross negligence of telegraph company,—see *TELEGRAPHS AND TELEPHONES*, 4.

Imputed negligence of infants,—see *INFANTS*, 2.

Negligence of carrier as affecting contract with shipper as to damages in case of loss,—see *CARRIERS*, 1.

Regulation on telegram form as relieving company from liability for gross negligence,—see *TELEGRAPHS AND TELEPHONES*, 3.

1. *Gross negligence—Definition.*—Gross negligence is the commission or omission of an act or duty owing by one person to a second party which discloses a failure to exercise slight diligence, i. e., the act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care. *Weld v. Postal Telegraph Co.*, 460.

2. *Contributory negligence—Sui juris.*—A boy fourteen years of age is deemed to be *sui juris*. *Jacobs v. H. J. Koehler Sporting Goods Co.*, 16.

P

PARENT AND CHILD.

Imputation of negligence of parent to child,—see *INFANTS*, 2.

PARTNERSHIP.

1. *Partnership—Duty of partner.*—In the absence of express agreement to the contrary, a partner is impliedly bound reasonably to devote himself to the advancement of the copartnership. *Barclay v. Barrie*, 446.

2. *Partnership — Dissolution — Permanent capacity of partner—Equity.*—Courts of equity have power to decree dissolution of a copartnership because of permanent incapacity of a partner which materially affects his ability to discharge the duties imposed by his partnership relation and contract. *Barclay v. Barrie*, 446.

3. *Partnership — Dissolution — Permanent incapacity of partner—Definition.*—"Permanent" incapacity as a ground for dissolution does not and should not mean incurable and perpetual disability during the life of the partner, but it means incapacity which is lasting rather than merely temporary, and the prospect of recovery from which is remote, which has continued or is reasonably certain to continue during so substantial a portion of the partnership period as to defeat or materially affect and obstruct the purpose of the partnership. *Barclay v. Barrie*, 446.

4. *Partnership — Permanent incapacity of partner—As ground for dissolution.*—When a partner has been totally incapacitated from attending to his duties for three years and eleven months out of a partnership period of four years and eleven months, with no assurances that he will recover before the expiration of the unexpired balance of eleven months, the incapacity has been of a permanent and not a temporary or fleeting character, and of a substantial and not inconsequential nature, and the purpose of his partner in joining with him has been materially and essentially defeated, so that the remaining partner is entitled as matter of law to a dissolution of the partnership. *Barclay v. Barrie*, 466.

5. *Partnership — Dissolution — Proof.*—In an action by a partner

against his copartner to procure the dissolution of the partnership on the ground of defendant's incapacity, the burden rests upon the plaintiff to show that the defendant had become incapacitated by reason of sickness from attending to the partnership affairs, and it is immaterial that the defendant, after his incapacity, was excluded from participation in these affairs. *Barclay v. Barrie*, 446.

6. *Partnership—Judgment of dissolution — Date.*—Under ordinary circumstances dissolution of a partnership will be adjudged as of the date when the judgment was granted, but when such adjudication will be of no benefit whatever, the court will adjudge such relief as of an earlier date. *Barclay v. Barrie*, 466.

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1. *Indictment—Demurrer.*—A demurrer must lie if at all to the whole of an indictment. *People v. Rosenheimer*, 72.

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1. *Instructions — Requests—General exception.*—The practice of permitting a general exception to the refusal to charge a mass of requests should not be followed by trial courts or sanctioned by appellate courts. *People v. Katz*, 315.

PRINCIPAL AND AGENT.

1. *Revocation of agency—Death of principal.*—The common law doctrine that death revokes an agent's powers even as to third persons dealing with the agent in good faith without notice is the general rule in this state, and this rule is an exception to the still broader rule that revocation of the power of an agent does not affect third parties dealing with him in good faith without notice. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

2. *Authority of agent to collect check—Revocation by death of principal.*—The death of the principal revokes the authority of the agent to collect the check. *Glennan v. Rochester Trust & Safe Deposit Co.*, 38.

PUBLIC SERVICE COMMISSION.

1. *Rate making—What considered—Appreciation in land value.*—For the purpose of rate making, the Public Service Commission cannot, in ascertaining the amount which should constitute a proper return, consider as part of what accrues to the relator as gross receipts of its yearly operations the annual appreciation in the value of its land. *People ex rel. Kings County Lighting Co. v. Willcox*, 355.

PUBLIC SERVICE CORPORATIONS.

What is considered by Public Service Commission for the purpose of rate making,—see **PUBLIC SERVICE COMMISSION**, 1.

1. *"Going value"—Rate making.*—"Going value" as distinct from "good will," is to be considered in valuing the property of a public

service corporation, either for the purpose of condemnation or rate making. *People ex rel. Kings County Lighting Co. v. Willcox*, 355.

2. "*Going value*"—*Definition*.—"Going value" for rate purposes is an amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property. *People ex rel. Kings County Lighting Co. v. Willcox*, 355.

3. "*Going value*"—*As separate from tangible property*.—"Going value" has no existence apart from tangible property, but it must be appraised separately from the physical property. *People ex rel. Kings County Lighting Co. v. Willcox*, 355.

4. "*Going value*"—*How appraised for rate making*.—"Going value" is to be appraised by showing the actual experience of the company, the original investment actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration. *People ex rel. Kings County Lighting Co. v. Willcox*, 355.

5. *Gas company*—*Rate making*—*What considered*.—For the purpose of rate making, a gas company is not entitled to have the cost of reproduction of paving, which was not in place at the time its mains were laid, allowed for in ascertaining the value of its property used in the public service or in ascertaining the capital actually expended. *People ex rel. Kings County Lighting Co. v. Willcox*, 355.

R.

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1. *When unconstitutionality of part affects whole*.—Where the condition imposed upon the issuance of an insurance broker's certificate by the statute requiring such certificates as a prerequisite to doing business is unconstitutional, the whole statute is invalid. *Hauser v. North British & Mercantile Ins. Co.*, 1.

2. *Construction—Two offences*.—Subd. 3 of § 290 of the Highway Law which provides that "any person operating a motor vehicle, who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine or not more than

\$500.00 or by imprisonment for a term not exceeding two years, or by both said fine and imprisonment," does not provide for two offenses or provide for an offense being committed in two different ways. *People v. Rosenheimer*, 72.

3. *Constitutionality — Highway law—Self incrimination.*—Subd. 3 of § 290 of the Highway Law which provides that "any person operating a motor vehicle, who, knowing that an injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than \$500.00 or by imprisonment for a term not exceeding two years, or by both said fine and imprisonment," does not violate § 6, art. 1, of the State Constitution which provides that no person shall "be compelled in any criminal case to be a witness against himself." *People v. Rosenheimer*, 72.

purchase money." Whether part payment or delivery and acceptance of part of the goods is relied upon to validate a verbal contract for the sale of goods, the participation and assent of both parties to the act is necessary. *Young v. Ingalsbe*, 45.

2. *Statute of frauds—Sale of personal property—Receipt and acceptance—Mutual participation or assent.*—Where plaintiff and deceased entered into a verbal agreement whereby plaintiff was to purchase the interest of deceased in a law library which they owned together and apply the purchase price on deceased's indebtedness to the plaintiff, and thereupon the plaintiff accepted of the interest, took possession and assumed ownership of the books and gave deceased credit on his indebtedness for the purchase price, but deceased took no part in the receipt or acceptance of the books, a valid contract is not established under § 31 Personal Property Law. Nor was the contract made valid by the credit given deceased as it was not made at the time of the agreement and the deceased was not in any way an actor in regard to it. *Young v. Ingalsbe*, 45.

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Right to dividend upon stock held in trust,—see *ESTATES; LIFE ESTATES*, 1, 3, 4.

T.

TELEGRAPHS AND TELEPHONES.

Telephone company or its employee using power company's pole as licensee,—see *LICENSES*, 1, 2.

1. *Regulations—Limiting liability.*—A telegraph company has a right to make reasonable regulations for the transaction of its business and to protect itself against liability which it might otherwise incur due to the carelessness of its agents and mistakes and defaults incident to the transaction

STATUTE OF FRAUDS.

1. *Statute of frauds—Sale of personal property—Part payment or delivery and acceptance of part—Mutual participation and assent.*—Personal Property Law, § 31, provides: "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . . (6) Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the

of its business. *Weld v. Postal Telegraph Cable Co.*, 460.

2. *Stipulations on blank form—Reasonable regulations.* The stipulations printed in the blank form used in sending telegrams that the company "shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeat message, beyond the amount received for sending the same;" nor on "any unrepeat message, beyond fifty times the sum received for sending same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages," are reasonable regulations, and create a contract between the sender of the message and the telegraph company. *Weld v. Postal Telegraph Cable Co.*, 460.

3. *Regulations on telegram form—Gross negligence.*—Public policy forbids that any regulations or contract, contained on a telegram form limiting the company's liability for mistakes, delays and nondelivery, shall relieve it from liability caused by gross negligence of its agents and employees. *Weld v. Postal Telegraph Cable Co.*, 460.

4. *Gross negligence—Extraordinary facilities on busy day.*—Gross neglect cannot be attributed to a telegraph company for failure to provide extraordinary facilities to insure speed and accuracy in the transmission and receipt of messages on "Bureau Day," or by reason of the amount of business likely to be transacted on a particular day. *Weld v. Postal Telegraph Cable Co.*, 460.

5. *Telegram—Delay in delivery—Question of law.*—While delay in the delivery of a telegram may, in some cases, be considered upon the question of negligence, it is for the court in the first instance to determine whether the delay was of such duration, under the circumstances adduced upon the trial, that negligence could be inferred. *Weld v. Postal Telegraph Cable Co.*, 460.

6. *Transmission of message—Immaterial mistakes.*—Where a telegram as sent read: "To Ellis N. O.

Sell 20 thousand Mch 12.70 Weld," and as received read: "To Ellis Sell twenty thousand March 1207 Well," the omission of "N. O.," the change of "20" to "twenty," "Mch" to "March" and "Weld," to "Well" are immaterial mistakes and do not disclose an absence of slight care on the part of the telegraph company, where they do not contribute to the injury complained of. *Weld v. Postal Telegraph Cable Co.*, 460.

7. *Telegram form—Failure to fill in blanks—Effect.*—The failure of the receiving operator of a telegraph company to fill in the blank on a telegram under the words "Sent by," or to insert the hour of receipt of the message, or of the sending operator to transmit the number of words or his signal, has no relation whatever to the contractual relation existing between the company and the sender of the message. *Weld v. Postal Telegraph Cable Co.*, 460.

8. *Unrepeat message—Failure to confirm—Gross negligence.*—The failure of a telegraph company's operators to confirm a message cannot be considered as a circumstance on the question of gross negligence, where all the sender of the message contracted and paid for was an unrepeat message. *Weld v. Postal Telegraph Cable Co.*, 460.

TRUSTS AND TRUSTEES.

Trustees in Bankruptcy,—see BANKRUPTCY.

Amendment of remittitur in proceeding for judicial settlement of trustee's account,—see APPEAL AND ERROR, 3.

Right to dividend upon stock held in trust,—see ESTATES; LIFE ESTATES, 1, 3, 4.

1. *Extraordinary dividends—Method of apportioning.*—In all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired, and the remainder thereof must be awarded to the life beneficiary. The method of accomplishing this result is to ascertain the intrinsic value of the trust

investment by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and then multiply that amount by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained the same way. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money, the amount of that difference is to be retained by the trustee as capital and the remainder paid to the life beneficiary; if in stock, the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good, the remaining shares going to the life beneficiary. *Matter of Osborne*, 177.

2. *Apportioning dividends*—*What may be considered*.—Market value, good will, and the like cannot be considered in apportioning a dividend between a life beneficiary and remainderman. *Matter of Osborne*, 177.

3. *Trustee—Commissions—Stock dividend*.—A trustee is not entitled to commissions on a stock dividend so far as it is retained in the corpus of the estate. *Matter of Osborne*, 177.

W.

WILLS.

1. *Vested gift—Testator's intent*.—Where a testator by his will gives and bequeathes to his son certain shares of corporate stock to be kept by testator's executors and transferred to him with the income collected thereon from the time of the testator's death when he (the son) reaches 21 years of age; and the will also provides that \$20,000 so first set apart shall be added to the aliquot share of my son in the balance of said residuary estate and be held for his benefit and belong

to him, subject to the provisions as to the income and principal of my residuary estate and the trust shares therein hereinafter contained," and further that the income is to be divided "into as many equal shares as I shall leave me surviving children or descendants of children, including the said son, and shall apply such shares of income to the use of those of my children or descendants who shall be infants, and pay over to those of them who shall have reached majority the shares of income set apart for them, the descendants of any deceased child of mine to take the share which their parent (my child) would have taken if living;" and it is also provided that the residuary estate after the death of the widow "shall be divided into as many equal shares as I shall leave children or descendants of children, one share for the benefit of each child and one for the benefit of the descendants taken together of any such deceased child," the intention of the testator is to make vested gifts to his son, subject to the provision therein for his widow, and also postponing the time when his son should have possession of the gifts. *Cammann v. Bailey*, 232.

2. *Rules of construction—Testator's intent*.—Rules for the construction of wills are for the sole purpose of ascertaining the intention of the testator, and if the intention is clear and manifest it must control, regardless of all rules that have been formed for the purpose of determining their construction. *Cammann v. Bailey*, 232.

3. *Vested remainder*.—The law favors the vesting of remainders. *Cammann v. Bailey*, 232.

4. *Will and codicil as single instrument*.—A will and existing codicil are to be regarded as a single and entire instrument for the purpose of determining testamentary intention and disposition. *Osburn v. Rochester Trust & Safe Deposit Co.*, 496.

5. *Revocation of codicil as revocation of will*.—A testator may revoke a codicil without destroying his will, where the will is in itself

a full and complete instrument, separate from the codicil. *Osburn v. Rochester Trust & Safe Deposit Co.*, 496.

6. *Modification by codicil—Effect of subsequent revocation of codicil.*—Where a codicil provides for an additional legacy before the creation of the residuary estate as provided in the will, it modifies and revokes the will to that extent, and the will cannot be restored to its original form and tenor simply by the revocation of the codicil. *Osburn v. Rochester Trust & Safe Deposit Co.*, 496.

WITNESSES.

1. *Corroboration by prior statement—Confession by accomplice as corroboration.*—When a witness rests under the imputation of a recently formed motive to falsify, it may be shown that he made similar

statements at a time when the imputed motive did not exist, or when motives of self-interest would have induced him to make a different statement from that which he actually made, therefore a confession by an accomplice given before he has received a promise of personal exemption if he will become a state's witness may be received as corroborating the testimony given by him on the witness stand. *People v. Katz*, 315.

2. *Credibility—Previous conviction—Opinion of trial judge qualifying effect of—Admissibility.*—The opinion of a trial judge, expressed when he was imposing sentence, that neither he nor the jury regarded the defendant as a criminal or a person of criminal tendencies, is not admissible to qualify the effect of a previous conviction upon the credibility of a witness. *People v. Cummins*, 93.

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